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Supreme Court, U.S.
FILED

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

SIEGFRIED HERRNREITER,
Petitioner Pro Se
v.
CHICAGO HOUSING AUTHORITY,
Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

CORRECTED PETITION FOR A WRIT OF CERTIORARI

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Filing Date: August 23, 2003

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QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Seventh Circuit ("Circuit Court"), erred, contravening with public policy and undermining the will of the people, expressed in the civil rights laws, by denying Petitioner's motion, to recall the mandate.

2. Whether the interpretation by the Circuit Court, of plaintiff's burden of proof under Rule 56, is so far out of line and in grave conflict with the majority of circuits, including the Third Circuit, that this Court is compelled to reverse the Circuit Court's compromised decision, to bring about uniformity of decisions on this important matter among the federal courts of appeals.

3. Whether the Circuit Court, abused its power by departing from the accepted and usual application of Summary Judgment Standards, to such an extent, that beneficiaries under these rules, in effect, have been reversed, so that unresolved issues have been resolved in favor of the moving party; and sanctioned such departure by the District Court, as to compel the exercise of this Court's supervisory powers, and to reverse.

4. Whether the District Court for the Northern District of Illinois, Eastern Division's ("District Court's") summary judgment deprived Petitioner of his rights under the Seventh Amendment to the Constitution, which guarantees the right of trial by jury in civil cases, where the amount of controversy is over $20, by cutting off the legal process prematurely.

PARTIES TO THE PROCEEDING

Including the parties named in the caption of this Petition, the parties are:

Petitioner: Siegfried Herrnreiter, an individual.

Respondents: The Chicago Housing Authority, a non-government corporate party to the proceedings before the United States District Court for the Northern District of Illinois, Eastern Division, and the United States Court of Appeals for the Seventh Circuit.

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CORRECTED PETITION FOR A WRIT OF CERTIORARI

SIEGFRIED HERRNREITER, Petitioner Pro Se, under appropriate rules of this Court, requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

This case deals with Petitioner's employment discrimination case by race and national origin, in connection with a job transfer and subsequent termination, and three legal disputes over (1) Summary Judgment granted by the District Court of the Northern District of Illinois, Eastern Division, (2) Circuit Court's Affirming District Court's Summary Judgment, and (3) Circuit Court's Denying Motion to Recall the Mandate, to Prevent a Miscarriage of Justice, to give Petitioner the Opportunity for Rehearing with Suggestion for Rehearing en Banc.

JURISDICTION

The jurisdiction of the District Court was invoked under Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. §2000e, *et seq.* and under 28 U.S.C. §§1331 and 1343.

Jurisdiction of this Court is invoked under 28 U.S.C. §1954(1)

RELEVANT PROVISIONS INVOLVED

Seventh Amendment, United States Constitution, U. S. Const. amend. VII.

STATEMENT OF THE CASE

A. Nature of the Case

This case involves an employment discrimination claim by race and national origin, in connection with a job transfer and subsequent termination. It also involves a claim of improper application of summary judgment standards, depriving Petitioner of his right of trial by jury:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.

U. S. Const. amend.VII.

On August 21, 1998, Petitioner filed a *pro se* complaint in the U.S. District Court of the Northern District of Illinois, Eastern Division.

On May 3, 1999, the District Court dismissed all defendants except the Chicago Housing Authority, hereafter referred to as "CHA", and all claims, except four counts under Title VII: race and national origin discrimination, national origin harassment, and retaliation.

On July 31, 2001, the District Court granted the CHA's motion for summary judgment on counts I - IV, and judgment was entered on that date.

On August 2, 2002, Petitioner appealed the District Court's order and judgment to the Circuit Court with respect to two claims: Discrimination by race and national origin.

On December 30, 2002, the Circuit Court affirmed the summary judgment on the two remaining counts and judgment was entered on that date.

On March 10, 2003, Petitioner filed with the Circuit Court a Motion to Recall the Mandate to Prevent a Miscarriage of Justice and to give Appellant the Opportunity to raise significant legal issues on Petition for a Rehearing with

suggestion for rehearing en banc, which will result in the court's proper decision to set aside the district courts decision granting summary judgment for appellee.

On March 13, 2003, the Circuit Court received appellant's motion to recall the mandate.

On March 14, 2003, the Circuit Court by order denied appellant's motion to recall the mandate.

The Circuit Court failed to notify appellant of the denial of motion. Appellant only learnt of the denial after calling the clerk of the court on March 24, 2003.

On March 29, 2003, Petitioner filed an application for extension of time to file petition for a writ of certiorari with this Court.

On April 24, 2003, Petitioner filed a corrected application for extension of time to file petition for a writ of certiorari with this Court.

On May 2, 2003, Petitioner's application for extension of time was granted to and including May 28, 2003, by justice Paul Stevens on in Application No. 02A931.

B. Statement of Relevant Facts

Petitioner is a naturalized U. S. citizen and was born in the Federal Republic of Germany. He received a bachelor degree in accounting from DePaul University in Chicago in 1974. From 1970 to1992, he worked at several banks in the Chicago area in the field of internal auditing. During that time, he also obtained certifications in the accounting and auditing fields, including: certified internal auditor, 1976; certified public accountant, 1978; chartered bank auditor, 1978; certified information systems auditor, 1986; and certified fraud examiner, 1989.
On April 20, 1992, Petitioner joined the Chicago Housing Authority (CHA), Office of the Inspector General (OIG), as a Senior Auditor. The OIG is charged with ferreting out fraud

and abuse at the CHA, and consisted of two departments: Auditing and Investigations, each headed by a manager. Petitioner was an auditor for about three and one half years.

On January 8, 1996, the effective transfer date, Petitioner was given the opportunity, to transfer to an investigator's position in the OIG. Petitioner was the first and only white investigator. Three investigators were black. All investigators reported to the chief investigator, Jeriel Howard, who was black. The investigator's position had a higher status. It also entitled Petitioner to a company car, for his exclusive use. Auditors, on the other hand, did not have company cars, not even the chief auditor. Petitioner worked largely in the field, and enjoyed a feeling of belonging to a group of professionals, who were highly regarded in the organization, also by the CHA tenants. Auditors were usually closely supervised by an abusive manager, had to keep detailed time records and sign in and out in the office. The auditor's position was a desk job. Audit work was routine, tedious and repetitive, and lacked a mental challenge. CHA rules require that on a transfer, the employee has to serve a six-months' period as a probationary employee. As such, the employee can be transferred with or without cause or reason; however, as a regular employee, having completed the probationary period, he can only be transferred for a reason.
On March 26, 1996, Leonard Odom became Inspector General. Odom is black. At some point, Odom signed the January M-PAR transfer form again, above the "Concurrence" block signature of his predecessor, Hubert Holton. The date of his signing was noted as March 27, 1996. With Odom's signing the transfer form again, the CHA alleges that Petitioner's transfer happened on that date, that his probationary period started running on that date, so that on August 2, 1996, the date of transfer, Petitioner was still a probationary employee. As such, under this theory, Odom could transfer Petitioner for no reason at all. Shortly after Odom arrived, he took Petitioner's assigned company car for his use, while the three black investigators got to keep their company cars.

On July 19, 1996, A.M. Howard told Petitioner that Odom was looking for investigators with law enforcement experience, and that he could not keep his job. On July 19, 1996, P.M. Odom told Petitioner that, since he had no law enforcement experience, he was

not as useful as an investigator and, therefore, could not keep his job. He wants Petitioner to go back to his auditor's job.

On July 31, 1996, Petitioner received his performance evaluation for the first six months as a rookie investigator. His Overall Rating: "Exceeds Expectations". As an Overall Rating, Howard gave Petitioner a 3.96 rating, Petitioner's highest rating while employed by the CHA, and according to Howard, "one of the highest marks within the investigations division." However, Petitioner received a numerical rating of "2", "Does Not Meet Expectations", in "Communication and Interpersonal Skills". This low rating cannot be reconciled with his high overall rating.

On August 2, 1996, Odom transferred Petitioner back to the auditor's position. Deposition testimony revealed that the transfer decision was made by Odom, with no input from Howard. Investigator Benton Fisher, black, was rated much lower than Petitioner, nearly 25 percent lower, but was not transferred from his investigator's position. Odom proffered two different reasons for Petitioner's transfer from the investigations department to auditing: Before the Illinois Dept. of Human Rights, lack of law enforcement training; but in Federal Court, Petitioner's failure to follow his (Odom's) instructions and insubordination. Odom could not support his allegation with concrete notes or documents. Petitioner denied that he had any discussion with Odom about a contract price issue and that his assignments ever dealt with a contract price. No mention of the alleged act of insubordination was made in Petitioner's July 1996 performance evaluation. The CHA concedes now that Petitioner was replaced by a black man, although they represented to the Illinois Department of Human Rights that Petitioner was replaced by a white man, and in fact, a white man of German extraction.

On September 9, 1996, Petitioner resumed his duties as auditor. On September 13, 1996, Turrubiartes, Petitioner's supervisor, assigned Petitioner to develop audit programs. Petitioner asserts that such an assignment was unusual, because during the three and one half years in auditing, it was the audit supervisor, not the auditors, who prepared audit programs. Respondent denied that the assignment was unusual. On October 1, 1996, three weeks later, Turrubiartes called a staff meeting. At that meeting, Turrubiartes announced that

any auditor failing to meet the requisite performance standards would be written up and would have 30 days to show necessary improvement. Odom instigated Turrubiartes that Petitioner be put on a corrective action plan.

On the next day, October 2, Turrubiartes told Petitioner that he had failed to meet performance standards. Turrubiartes presented Petitioner with a Corrective Action Plan (CAP). The CAP, a five-page, closely-typed document, was a 30-day plan of action which required Petitioner to meet a list of goals based on alleged deficiencies in his performance. During the next week, on October 3, October 4, October 7 and October 8, Turrubiartes wrote memoranda critical of Petitioner's performance, but did not show Petitioner the memoranda, documenting his alleged shortcomings at the time they were written. Rather, Turrubiartes simply placed them in Petitioner's personnel file. Turubiartes claims, however, he spoke to Petitioner about his poor performance. This was contrary to CHA Personnel Policy, Part 2504, "Employee Corrective Action and Termination", which specifies three methods of employee corrective action: a. oral reprimand; b. written reprimand; c. corrective action notice/termination notice and required that the employee be given a copy of the writing. On October 10, 1996, eight days after being placed on a 30-day CAP, Odom instructed Turrubiartes to contact CHA's human resources department to determine whether he could terminate Petitioner before the expiration of the month-long CAP. When Turrubiartes reported back that termination was permissible prior to the CAP's conclusion, Odom made the decision to terminate Petitioner. On that day, Turrubiartes sent a memorandum to the supervisor of CHA's human relations field services. In that memorandum, Turrubiartes identified the reasons for Petitioner's alleged noncompliance with the CAP, all of which occurred between October 2, and October 7, 1996.

On October 15, 1996, a disciplinary meeting was held and it was only then that Petitioner first saw the four critical memoranda written by Turrubiartes. On October 25, 1996, ten days later, Petitioner was terminated. Petitioner provided documents that all black employees placed on corrective action plans were allowed to complete their full terms, and were disciplined less severely: They received written reprimands, but kept their jobs.

C. The District Court's Decision

The District Court granted Summary Judgment for Respondent on all (4) counts on July 30, 2001. Petitioner appealed to the Circuit Court on two counts: Discrimination by Race and National Origin regarding Petitioner's Transfer out of his investigator's position, and Termination from his auditor's job.

In arriving at its decision, the District Court departed from the accepted and usual application of Rule 56, by construing unresolved issues and all the evidence in the record, in the light most favorable to *Respondent*, not, as the rules prescribe, *the non-moving party;* by not drawing inferences in favor of Petitioner, as required by the rules, and by deciding material unresolved issues of fact, which are to be passed on to a jury.

D. The Seventh Circuit's Decisions

The Circuit Court affirmed Summary Judgment on Both Counts: Transfer and Termination, on December 30, 2002.

In arriving at its decision, the Circuit Court sanctioned the District Court's departure from the accepted and usual application of summary judgment standards, and departed itself from those standards, by construing unresolved issues and all the evidence in the record, in the light most favorable to *respondent*, not, as the rules prescribe, *the non-moving party;* by not drawing inferences, supported by evidence, in favor of Petitioner, as required by the rules; and by deciding material unresolved issues of fact, which are to be passed on to a jury.

The Circuit Court denied Petitioner's Motion to Recall the Mandate, to Prevent a Miscarriage of Justice, on March 14, 2003.

In arriving at its decision, the Circuit Court either must not have seen the information and evidence furnished by Petitioner in his Affidavit, or ignored it. In the first instance, it would be error, but in the latter, it could amount to obstruction of justice, in Petitioner's opinion, since Petitioner provided

all evidence needed to establish a prima facie case, and documentary proof beyond a reasonable doubt, that both of his claims were actionable civil rights offenses.

Petitioner provided evidence that his transfer out of his investigator's position did rise to the level of a material adverse employment action, since Petitioner suffered a future financial harm, having to forego a pay adjustments due to an upgrade of the investigator's position in 1996, of $6,400 per year, and a retroactive pay adjustment in 1997, of $8,400 per year.

Regarding his second count, termination, Petitioner provided a more plausible reason for Odom's speeding up his departure from the CHA.

By denying the motion, the Circuit Court erred by:

(1) contravening with public policy and undermining the will of the people, expressed in the civil rights laws.

(2) deviating from case law, which supports the recall of the mandate to prevent the miscarriage of justice, regarding both counts, transfer and termination.

(3) not applying its own cited example for actionable adverse employment actions involving a transfer, which resulted in future financial harm to the employee and

(4) not taking into consideration information provided by Petitioner, regarding Odom's more plausible motivation for speeding up his departure from the CHA.

REASONS FOR GRANTING THE WRIT

Summary Judgment Standards in Employment Discrimination Cases

The District Court utilized a truncated, single summary judgment standard, or short-cut approach, in its "Discussion" section:

> Summary judgment is appropriate only when "the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c); *see also Flores v. Preferred Tech. Group,* 182 F.3d 512, 514 (7th Cir. 1999), App. 17.

Whereas Petitioner identified the following seven (7) summary judgment standards and guidelines, used by the majority of appeals courts, which have evolved over time by case law:

Summary Judgment Standards ("SJS") used by the Majority of Appeals Courts:

1. **Movant must demonstrate, that there is no "genuine dispute of material fact" and that movant is entitled to judgment as a matter of law.**

2. **Court deciding summary judgment motion generally may not make fact-findings.**

3. **It is generally agreed that the evidence must be viewed in a light most favorable to the party opposing the motion.**

4. **The court may not weigh the evidence in disregard of the jury's role as fact-finder. § 62:774, infra.**

5. **The court must make reasonable inferences, which tend to support the non-moving party.**

6. **A motion for judgment[,]as a matter of law[,]should be cautiously and sparingly granted. 1st.Circuit – *Newell Cos. v. Kenney Mfg. Co.* (1985, DG RI) 606 F. Supp 1282, 226 USPQ 157, ...**

7. **It is error for the court to grant a motion for summary judgment, where there is sufficient evidence to submit the case to a jury. *Anderson v. Liberty Lobby, Inc.* (1986) 477 US 242.....**

It is not surprising, therefore, that the District Court's decision is fraught with errors, since it did not give consideration to six (6) additional standards. And, on the sole standard utilized, applied a less than half-hearted effort, trying to identify *genuine issues of material fact*, the existence of any of which would require a trial. Petitioner will attempt to show, that errors occurred involving basically all seven (7) standards:

Circuit Court Sanctioned the District Court's Departure from the Accepted and Usual Application of Rule 56.

Petitioner's Case Involves Two Counts of Discrimination by Race and National Origin in Leonard Odom's Employment Decisions:

Transfer out of Investigator's Position to Sr. Auditor, Effective August 2, 1996, Count 1, and Termination as Sr. Auditor, on October 25, 1996, Count 2.

District Court

A-1. Transfer out of Investigator's Position to Sr. Auditor

The District Court Erred in its Decision That Petitioner Could not Establish a Prima Facie Case, Since He Cannot Show that the transfer was a Materially Adverse Employment Action:

> Herrmreiter cannot establish a *prima facie* case of intentional race or national origin discrimination stemming from his

reassignment to auditor because he cannot show that the reassignment to auditor was a materially adverse employment action. A materially adverse action occurs when an employee is "fired or demoted, suffers a decrease in benefits or pay, or is given a significantly lesser job." *Hill v. Am. Gen. Fin., Inc.*, 224 F.3d 681, 645. App. 21.

A purely lateral transfer does not constitute a materially adverse employment action. *Williams v. Bristol-Meyers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996). App. 21.

Furthermore, a plaintiff's own perceptions regarding the prestige of a position are insufficient, absent other evidence, to establish a materially adverse employment action. *Flaherty v. Gas Research Inst.*, 31 F.3d 451, 457 (7th Cir. 1994). App. 21.

In Herrnreiter's case, his reassignment did not involve a decrease in pay. (Def.'s 56.1 St. §43.). Furthermore, all of the paperwork documenting his initial transfer from auditor to investigator indicates that that transfer was purely a lateral one. (Ex. 3 to Odom Dep.) App. 21.

But the Circuit Court has defined the term adverse employment action "Quite broadly". *Id.* Such actions include losses not easily quantifiable, *id.*, and losses not quantifiable at all. *See Dahm v. Flynn*,....

1. Whether a Change in the Terms or Conditions of Employment is a Materially Adverse Employment Action Cognizable under Title VII, is a Question of Fact.

Whether an employer's alteration of a term or condition of employment constitutes a material adverse action is a question of fact. *Williams v. Bristol-Meyers Squibb Co.*, 85 F.3d 270, 273-74 (7th Cir. 1996); *see Dahm v. Flynn*, 60 F.3d 253, 257 (7th Cir. 1994)(whether erosion of job duties, some of which were fairly characterized as trivial, was materially adverse, presented a fact question). Such a determination can be answered on summary judgment "only if the question is not fairly

contestable." *Williams*, 85 F.3d at 274. Decision was a departure from Summary Judgment Standards (SJS) #1 and #2.

2. Petitioner Presented Evidence which Demonstrates that his Transfer out of the Investigator's Position to Sr. Auditor was a Material Adverse Employment Action.

A transfer, even one which does not alter the employee's wages and benefits, may still be a materially adverse job action. *Flaherty*, 31 F.3d at 456-57; *Collins*, 830 F.3d at 703. Where the transfer results in more than a minor change in working conditions, it is a cognizable job action under Title VII. *Williams*, 85 F.3d at 274.

The District Court erred in its decision that Petitioner failed to provide evidence of pretext in the CHA's changing the reason for Petitioner's transfer from "lack of law enforcement training" in its proceeding with the Illinois Department of Human Rights, to "not always following instructions and insubordination", a disciplinary problem, in Federal Court.

> Even if Herrnreiter were able to establish a *prima facie* case of discrimination, his claim would nonetheless founder due to his failure to provide evidence from which a reasonable jury could conclude that CHA's reason for reassigning him was pretextual. According to CHA, at the time Herrnreiter was transferred back, he was on probationary status for the investigator position and could have been terminated for any (legal) reason. Even accepting Herrnreiter's contention, however, that he was transferred to the position in January of 1996 and was, therefore, not on probationary status, CHA has presented a facially nondiscriminatory reason for reassigning Herrnreiter: namely, that Herrnreiter repeatedly failed to follow instructions when he was an investigator. (Def.'s 56.1 St. § 32.) The burden therefore shifts to Herrnreiter to produce evidence from which a jury could find that this legitimate reason offered by CHA was not its true reason but rather a pretext for discrimination. App. 22-23.

The question of whether or not the transfer reason was pretext for discrimination is a factual question and to be decided by a jury. Decision involves a departure from Summary Judgment Standards (SJS) #1 and #2.

Both reasons are materially different and inconsistent, and do show pretext in Odom's transfer decision. While the majority of courts holds that the inference of discrimination may be drawn from the employer's proffered reason(s), the District Court was satisfied that the second reason was a "facially nondiscriminatory reason for reassigning Herrnreiter".

The District Court decided that the two reasons were the same, resolving the issue in favor of the moving party. The District Court was not concerned, that:

(i) Odom had no evidence to support his allegation,
(ii) Petitioner denied that such an incident happened,
(iii) there was no negative comment in Petitioner's performance evaluation and
(iv) there was no evidence in his personnel file of him not following instructions or his insubordination.

The District Court departed from SJS #1, 2, 3, 4, 5, and 6.

3. The CHA Proffered Different Reasons for the Transfer, and in Any Event, Whether the Reasons are Different or not is a Question of Fact.

An inference of pretext may arise where the employer gives different and arguably inconsistent reasons at different times. *Dominguez-Cruz v. Suttle Caribe, Inc.*, 202 F.3d 424, 433 (1st Cir. 2000)(listing cases, including *Castleman v. Acme Boot Co.*, 959 F.2d 1417, 1422 (7th Cir. 1992)). See Petitioner's Evidence: Different Reasons a Question of Fact, App. 41-43. The District Court departed from SJS #1 and 2.

4. Odom's Transferring Petitioner Immediately after He Received an Excellent Performance Evaluation Suggests Pretext, and Violated CHA Policy.

In order to demonstrate that the employer's proffered nondiscriminatory reason is pretextual, the plaintiff may show

that the reason: (1) has no basis in fact; (2) did not motivate the adverse employment decision; or (3) was insufficient to motivate that decision. *Velasco v. Illinois Dept. of Human Services*, 246 F.3d 1010, 1017 (7th Cir. 2001). Petitioner contends that his transfer immediately after receiving an exceptional performance evaluation touches all three bases of establishing pretext.

(i) Petitioner's Performance as Investigator "Exceeded Expectations."

Finally, no scrap of paper exists to support Odom's serious claim of insubordination. When asked how many times [Petitioner] failed to follow instructions, Odom responded that he did not "keep a score card" on Petitioner.

Consequently, a question arises, whether Odom genuinely believed the claim of insubordination and failure to follow instructions at the time of the transfer, because evidence that supports pretext calls into question the truthfulness of the employer's reason for the adverse employment action. *Olsen v. Marshall & Ilsley Corp.*, 267 F.3d 597, 601 (7th Cir. 2001). See Petitioner's Evidence: Pretext & Violation of Policy: Transfer with Excellent Performance, App. 43-46.

(ii) Odom Violated CHA Policy by Transferring Petitioner After He Received the "2" Rating.

An employer's violation of its own stated rules may give an inference of discrimination. *Williams*, 85 F.3d at 275. The District Court clearly departed from SJS #1, 2, 3, 4 and 5.

5. The Fact, that Odom did not Treat Petitioner Like Similarly-Situated Black Investigators, Calls into Question, Whether Petitioner's Alleged Insubordination Motivated Odom's Transfer Decision.

See Petitioner's Evidence, Different Treatment of Black Investigators Calls into Question Transfer Reason of Insubordination, App. 46. The District Court clearly departed from SJS #1, 2, 3, 4 and 5.

6. If Odom's Signature on the January M-PAR Form was Simply Necessary to "Finalize" Petitioner's Transfer to

the Investigator Position, the CHA had no Basis to Assert that Petitioner's Probationary Period had Changed.

Before the District Court, the CHA argued that on August 8, 1996, the effective date of Petitioner's transfer, he was still on probationary status. The CHA made this argument because Odom re-signed the January transfer form, which his predecessor, Hubert Holton, had executed on January 5, 1996. In probationary status, Petitioner could have been terminated for any reason. See Petitioner's Evidence: CHA had no Basis to Assert that Petitioner's Probationary Period had Changed, App. 47. The District Court departed from SJS #1, 2, 3, 4 and 5.

7. Whether the CHA's Statement to the IDHR, that Petitioner was Replaced by a White Man of German Extraction is an Error or an Intentional Effort to Mislead that Agency, is a Question of Fact.

The District Court erred by not drawing an inference of pretext in Petitioner's favor on this issue. See Petitioner's Evidence: CHA's Statement to the IDHR, that Petitioner was Replaced by a White Man of German Extraction, App. 47-48. The District Court clearly departed from SJS # 5.

8. Whether the CHA's Failure to Advance Petitioner's Alleged Performance Problems to the IDHR, is Evidence that Performance was not the True Reason for the Transfer, is a Material Question of Fact.

Petitioner presented a case almost identical to Petitioner's situation to the point: Where one party to the law suit added a "performance problem" as the reason for the adverse employment action: *McCoy v. WGN Continental Broadcasting Co.*, 957 F.2d 368, 373 (7th Cir. 1992).
The Court noted that WGN's failure to advance the plaintiff's performance at the agency level was evidence that the plaintiff's performance was not the true motivation for the adverse actions. *Id.* See Petitioner's Evidence: Failure to Advance Petitioner's Performance at the Agency Level, App. 48. The District Court clearly departed from SJS #1, 2, 3 and 4.

9. The Majority of U.S. Courts of Appeals Hold that Pretext Can Prevent Summary Judgment. Below is an Example of a Structured Approach Followed by the U.S. Court of Appeals for the Third Circuit:

a. This majority of courts relies on the statements in Hicks that the "rejection of the defendant's proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination," 113 S. Ct. 2749. E.g. *Collier v. The Budd Company*, 66 F.3d 886, 893 n.11 (7th Cir. 1995); *EEOC v. Ethan Allen, Inc.*, 44 F.3d 116, 120 (2d Cir. 1994); *Washington v. Garrett*, 10 f.3d 1421, 1433 (9th Cir. 1993). Cf. *Barbour v. Merrill*, 48 F.3d 1270, 1277 (D.C. Cir. 1995), cert. granted on the ground, ...S. Ct., 64 U.S.L.W. 3068 (1/19/96); id. at 1281 (statement of Williams, J., concurring in denial of rehearing in banc).

b. The U.S. Court of Appeal for the Third Circuit has also taken the position that "if the plaintiff has pointed to evidence sufficient[ ] to discredit the defendant's proffered reasons, to survive summary judgment the plaintiff need not also come forward with additional evidence of discrimination beyond his or her prima facie case."

c. The U.S. Court of Appeal for the Third Circuit approach continues to accord a special place to a central element of that framework -- the defendant's proffered explanation.

d. Plaintiff at this stage may defeat a summary judgment motion "by either (i) discrediting the proffered reasons, either circumstantially or directly, or (ii) adducing evidence, whether circumstantial or direct, that discrimination was more likely than not a motivating or determinative cause of the adverse employment action." Fuentes, 32 F.3d at 764. (emphasis in original).

e. If the plaintiff relies on the first method, our cases require the use of a complicated standard for determining whether the plaintiff's reasons have been sufficiently discredited.

Under this standard, a plaintiff cannot defeat summary judgment "simply by arguing that the fact finder need not believe the defendant's proffered legitimate explanations," but the plaintiff need not "adduce evidence directly contradicting

the defendant's proffered legitimate explanations." Id. at 764. **Rather, the non-moving plaintiff must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable fact finder could rationally find them 'unworthy of credence'" Id. at 765 (citation omitted).**

f. The degree to which evidence discrediting an employer's explanation tends to show discrimination on the ground alleged by the plaintiff depends on a number of other factors that will vary from case to case.

g. Once the defendant in a McDonnell Douglas case has shouldered the production burden, the court, in ruling on a defense motion for summary judgment or judgment as a matter of law, should inquire directly whether, based on all of the evidence in the record **when viewed in the light most favorable to the plaintiff, a reasonable trier of fact could find that discrimination on the ground alleged was, more likely than not, a determinative cause of the action at issue. This inquiry will require an assessment of four categories of evidence.**

1. There is the inference of discrimination that naturally arises from the elements of the prima facie case. The strength of this inference, however, will vary from case to case.

2. There is the inference of discrimination that may often be drawn from the ruling out of the employer's proffered reason(s). The degree to which such an inference is justified, however, is inversely proportional to the degree to which the record contains evidence of a third possible cause for the challenged employment action.

3. Disbelief of the employer's proffered reason(s) may also give rise to an inference that the employer was trying to conceal discrimination on the ground that the plaintiff claims. But the strength of this inference, too, will vary based on the facts.

4. Any other relevant evidence of discrimination on the ground asserted. "[S]tray remarks in the workplace" that are insufficient to make out a Price Waterhouse case are an example. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring).

The District Court deviated substantially from the majority of Appeals Courts, by not granting the issue of pretext due to different transfer reasons, the same importance and central role. The District Court veered off the traditional path of the majority of appeals courts, touching on SJS #1, 2, 3, 4 and 5.

B-1. Termination as Sr. Auditor

The District Court Erred in its Decision that Petitioner Could not Establish a Prima Facie Case of Intentional Race Discrimination or National origin discrimination Arising out of the Termination of his Employment:

Under *McDonnell Douglas*, Herrnreiter cannot establish a *prima facie* case of intentional race discrimination or national origin discrimination arising out of the termination of his employment, because he cannot show that he was meeting the legitimate expectations of the CHA at the time of his termination. Herrnreiter concedes that in September 1996 Turrubiartes gave him a significant audit assignment and that he failed to perform the assignment adequately (Pl's 56-1 Response § para 64-67.) App. 24.

1. The CHA's Decision to Terminate Petitioner Based on Poor Performance, Made Within one Month of his Return to the Auditing Department, Raises Issues of Material Fact.

An employer impermissibly biased against an employee cannot create a situation where the employee is destined to fail in a job assignment and then terminate the employee based on poor performance. *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990). An employer's rapid disciplinary action against an employee, when considered

against the employee's past record of satisfactory performance, may give rise to an inference of discrimination. *See Collins v. State of Illinois,* 830 F.2d 692, 705 (7th Cir. 1987) (rapidity and proximity to protected conduct, considered against the backdrop of prior satisfactory service, establishes prima facie case of retaliation). See Petitioner's Evidence: Pretext and Violation of Policy: Termination within one Month Raises Issues of Material Fact. App. 49. The District Court departed mainly from SJS #1.

2. Issues of Fact Exist as to Whether the Corrective Action Plan Imposed on Petitioner, Within 22 Days of his Resuming the Position of Senior Auditor, was Simply a Devise to Cover Petitioner's Wrongful Termination.

See Petitioner's Evidence: Issues of Material Fact Exist, Whether Corrective Action Plan was Simply a Devise to Cover Petitioner's Wrongful Termination. App. 49-53. The District Court departed mainly from SJS #1.

3. Petitioner Presents Other Evidence of National Origin Discrimination.

Employment discrimination under Title VII can demonstrate through direct or indirect method. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). However, the elements of proof in such cases are not meant to be "rigid, formalistic, or ritualistic." *Furnco Const. Corp. v. Walters,* 438 U.S. 567, 577 (1978); *Sattar v. Motorola,* 138 F.3d 1164, 1169-70 (7th Cir. 1998). In accord with the Supreme Court's admonition in *Furnco,* this Court has recognized that a plaintiff is free to present a "mosaic" of evidence) ; *and see Kastel v. Winnetka Bd. of Educ., Dist. 36,* 946 F.Supp. 1329, 1337 (N.D.Ill. 1996)(*McDonnell Douglas* not *sine qua non* to making out discrimination claim, but plaintiff's guide to creating necessary inference). See Petitioner's Evidence: Petitioner Presents Other Evidence of National Origin Discrimination. App. 53-54. . The District Court departed mainly from SJS #5.

4. Petitioner Has Produced Sufficient Evidence of Pretext in His Termination to Preclude Summary Judgment.

An employer intent on impermissible discrimination cannot create a situation where an employee is destined to fail in a job assignment, and then terminate that employee based on poor performance. *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990). Furthermore, rapid disciplinary action against an employee, when considered against the employee's past record of satisfactory performance, may give rise to an inference of discrimination. *See Collins v. State of Illinois*, 830 F.2d 692, 705 (7th Cir. 1987)(rapidity and proximity to protected conduct, considered against the backdrop of prior satisfactory service, establishes prima facie case of retaliation). See Petitioner's Evidence: Petitioner has Produced Sufficient Evidence of Pretext in his Termination to Preclude Summary Judgment. App. 54-56. The District Court clearly departed from SJS #1, 2, 3, 4 and 5.

Circuit Court

The Circuit Court sanctioned the District Court's departure from the accepted and usual application of Rule 56; it abandoned its intrinsic function to review the District Court's compliance with summary judgment standards, and focused instead on deciding the case; in this endeavor, the Circuit Court followed the District Court's example of departing from the usual and customary application of summary judgment standards, as used by the majority of appeals courts, by either ignoring material facts or presenting consistently the Respondent's version of the facts. See SJS 1, 3 and 4.

A-2. Transfer out of Investigator's Position to Sr. Auditor

The Circuit Court Erred in its Decision that Petitioner Could not Establish a Prima Facie Case, Since he Cannot Show that the Transfer was a Materially Adverse Employment Action:

But the Circuit Court has defined the term adverse employment action "Quite broadly". *Id.* Such actions include losses not easily quantifiable, *id.*, and losses not quantifiable at all. *See Dahm v. Flynn,....*

1. The Circuit Court erred in its decision that a transfer in which the employee's own pay does not change, is not actionable, since it did not take into consideration that the black man who received Petitioner's job, was hired at an annual pay which was $6,400 higher than Petitioner's pay.

2. Whether a Change in the Terms or Conditions of Employment is a Materially Adverse Employment Action Cognizable under Title VII, is a Question of Fact. The Circuit Court erred by not forwarding the case to a jury. Instead, it decided prematurely that the two jobs, the investigator's job and auditor's job, were equivalent, other than in idiosyncratic terms. The Circuit Court then listed as actionable cases, those in which a nominally lateral transfer with no change in financial terms significantly reduces the employee's career prospects and continued:

> ...They are to be distinguished from cases involving "a purely lateral transfer, that is, a transfer that does not involve a demotion in form or substance...[such a transfer] cannot rise to the level of a materially adverse employment action. A transfer involving no reduction in pay and no more than a minor change in working conditions will not do, either." *Williams v. Bristol-Meyers Squibb Co.*, 85 F.3d 270, 274(7th Cir. 1996). App. 3.
>
> What remains are cases of purely subjective preference for one position over another – which is this case. An auditor's job is not objectively inferior to an investigator's job that has identical financial terms; ...The use of a company car and being excused from having to sign in or out of an office might be preferred by some employees, but not having to run around all day might be considered by others ample compensation for giving up those particular perks. The two jobs were equivalent other than in idiosyncratic terms ...App. 4-5.

> Although as we saw earlier Herrnreiter's transfer from the investigation division back to the audit division was not actionable, ...App. 7.

Whether an employer's alteration of a term or condition of employment constitutes a material adverse action is a question of fact. *Williams v. Bristol-Meyers Squibb Co.*, 85 F.3d 270, 273-74 (7th Cir. 1996); *see Dahm v. Flynn*, 60 F.3d 253, 257 (7th Cir. 1994)(whether erosion of job duties, some of which were fairly characterized as trivial, was materially adverse, presented a fact question). Such a determination can be answered on summary judgment "only if the question is not fairly contestable." *Williams*, 85 F.3d at 274.

3. The Circuit Court erred in its decision not to take into consideration the inferences based on the evidence submitted by Petitioner, (See above under District Court, B-1, issues of material fact 1 to 5), which the court was required to make, under Summary Judgment Standards. The Circuit Court clearly departed from SJS #1, 2, 3, 4 and 5.

4. The Circuit Court erred by presenting consistently the Respondent's version of the facts, violating Summary Judgment Standards 3 and 4 listed above: It is generally agreed that the evidence must be viewed in a light most favorable to the party opposing the motion; and the court may not weigh the evidence in disregard of the jury's role as fact-finder. §62:774, infra.

> It is true that he received a highly positive performance rating for his few months as an investigator. But appointing a person inexperienced in law enforcement to be an investigator was an experiment and there is irrefutable evidence that it failed because Herrnreiter did not have proper techniques for interviewing witnesses and did not mend his ways in response to criticisms and directives from his supervisors. App. 8.
>
> It is true that he was replaced by a black person when he was transferred, but it is also true that a black investigator

> terminated for unsatisfactory performance shortly after Herrnreiter's transfer was replaced by a white. App. 9.
>
> But Herrnreiter still must lose, as there is no evidence that his race or national origin played a role in his transfer back to audits. App 8.

The Circuit Court departed clearly from SJS #5: *The court must make reasonable inferences, which tend to support the non-moving party.*

5. The Circuit Court's concentration on the Respondent's side of the issues, is reflected in two false statements which do not reflect the facts and written evidence in this matter:

> ...and there is irrefutable evidence that it failed because Herrnreiter did not have proper techniques for interviewing witnesses ... App. 8.

Not so. Petitioner presented written documentation, his performance evaluation, with an overall rating of "exceeds expectations" and which contradicts the above allegations squarely: Under the "Strengths" section, Howard wrote of [Petitioner]: "Performs well in taking statements, quality reports submitted timely. Quality and especially quantity of work is excellent."

Consequently, the statement should be reversed and corrected to read: ...and there is irrefutable evidence that Herrnreiter did have proper techniques for interviewing witnesses ...

The second portion of this false statement also has no basis in fact:

> ...and there is irrefutable evidence that it failed because ... [Herrnreiter] did not mend his ways in response to criticisms and directives from his supervisors. App. 8.

Notwithstanding Odom's claim of [Petitioner]'s insubordination, the performance evaluation is completely devoid of any critical comments of any sort. The Circuit Court espoused the Respondents false deposition statements, which

Petitioner disproved with written document, containing signatures of both, Howard, as evaluator, and Odom, as approver! The Circuit Court departed clearly from SJS #3 and 4.

The Circuit Court also was not shy expressing open bias and sarcasm:

> He [Petitioner] *loved* being an investigator…App. 2.
>
> But the idyll was short-lived. App. 2.
>
> Herrnreiter interprets these paraphrases to mean *any* action that displeases the employee [is actionable]. If he is right, one dirty look would be enough to trigger liability under Title VII. App. 2.

B-2. Termination as Sr. Auditor

The Circuit Court sanctioned the district court's departure from the accepted and usual application of Rule 56; then followed the District Court's example, departing from the usual and customary application of summary judgment standards used by the majority of appeal courts, by either ignoring material facts raised by Petitioner, or presenting consistently the Respondent's version of the facts:

1. The Circuit Court erred in its decision not to take into consideration the inferences based on the evidence submitted by Petitioner. (Same as A 3. under Transfer). The Circuit Court clearly departed from SJS #5.

2. The Circuit Court erred by presenting consistently the Respondent's version of material facts. (Same as A 4. under Transfer).
   - (i) The significant auditing project was a standard auditing task
   - (ii) the deadlines were not rigid
   - (iii) an inference can be drawn that Herrnreiter was sulking …and
   - (iv) his superiors' demands appear to have been reasonable.

> ...but the tasks he was given and failed to complete were standard auditing tasks rather than the labors of Hercules. There were deadlines, but they were not rigid; so far as appears, had he reported progress they would have been extended. App. 7.
>
> The likeliest inference from the facts developed in the summary judgment proceeding is that he was sulking because of having been transferred back to the audit division, losing the car and the freedom of an investigator. He admitted in his deposition that "he probably gave up" trying to satisfy his superiors' demands, though they appear to have been reasonable. App. 7.

The Circuit Court departed mainly from SJS #1, 2, 3 and 4.

3. Since Petitioner showed pretext in connection with his transfer out of the Investigator's job, where the main decision maker gave two different reasons, the District Court and Circuit Court were required to draw an inference of discrimination by race/national origin, according to summary judgment standard. This would be usable as evidence that Petitioner's subsequent termination by Odom was the second step of a two-step adverse employment action that was invidiously motivated. *Mathewson v. National Automatic Tool Co.*, 807 F.2d 87, 91 (7th Cir. 1986); cf. *Oest v. Illinois Dept. of Corrections*, 240 F.3d 605, 613-14 (7th Cir. 2001); *Becker v. ARCO Chemical Co.*, 207 F.3d 176, 194 n. 8 (3d Cir., 2000). The Circuit Court departed mainly from SJS #5.

Motion to Recall the Mandate –Transfer, Count 1.

Petitioner deals with two counts of discrimination by race and national origin: Odom Transferred Petitioner out of his Investigator's job away and Gave it to a Black Man, Count 1; and Odom Terminated Petitioner, since he was afraid that Petitioner would find out about the pay increase he had to forego, due to being transferred out of a higher paying and higher status job, and that he might take legal action for discrimination on a prohibited basis, Count 2.

A-3. Odom Transferred Petitioner out of his Investigator's job and Gave it to a Black Man.

1. Petitioner brought to the Circuit Court's attention, in his motion to recall the mandate and detailed in his Affidavit, that Court's decision resulted in a miscarriage of justice, since the Court failed to take into consideration all evidence, which Petitioner presented, which could prove unequivocally that there was a substantial difference between the investigator job and the auditor job, and that consequently, the job transfer did represent a *"materially adverse employment action"*. App. 34.

2. Petitioner pointed out in his Affidavit, that there were additional records, which would prove that the illegal transfer from his investigator's job by Odom did result in a future financial harm of $6,400 in 1996, and $8,400 in 1997 and future years, and did represent a *"materially adverse employment action'*. App. 34-35.

3. Petitioner pointed out in his Affidavit, that there were additional documents, which would prove that the investigator's position had been upgraded and that higher salary levels had been established in 1996, which Petitioner had to forego due to being transferred out of this position. It suggests that the real motivation for transferring Petitioner was that he did not want him to benefit from the impending upgrade in salary ranges. Petitioner suggested that since Odom could not provide a valid reason for the transfer, the Circuit Court should infer that Odom's motivation was illegal and that he was scheming that Petitioner should forego a potential pay increase. The amount in question, $6,400 per year, did represent a *"materially adverse employment action'*. App. 34-35.

4. Finally, Petitioner informed the Circuit Court that two of his investigator colleagues, Linnie Price and Norman Irvin, received retroactive pay raises to $51,000 effective January 1, 1997, which Petitioner also had to forego, which resulted in a future financial harm to Petitioner of $8,400 per year for future years. App. 36.

Motion to Recall the Mandate –Termination, Count 2.

B-3. Odom Terminated Petitioner, since he was afraid that Petitioner would find out about the pay increase he had to forego, due to being transferred out of a higher paying and higher status job, and that he might take legal action for discrimination on a prohibited basis.

1. Petitioner provided additional information to the Circuit Court which could shed light on Odom's true motivation for speeding up Petitioner's departure from the CHA: to prevent Petitioner from learning about a substantial upgrade of the Investigator's job and increase in pay which he had to forego: Odom knew that it would be difficult, if not impossible, to keep the increase of investigator salary ranges in 1996 a secret, as long as Petitioner was in the OIG department. He needed to facilitate Petitioner's departure and this is how he determined that Petitioner was dispensable. His scheme could be termed as *"preemptive termination"*. App. 36.

The Circuit Court's Denying Motion to Recall the Mandate Represents a Grave Departure from Case Law.

1. Recall of Mandate – Generally

(i) Court of appeal's power to recall and reform a mandate even after issuance is, though not specifically provided for in the Rules of Appellate Procedure, well established and no motion is required for the court to hear or rehear a cause en banc. Sparks v. Duval County Ranch Co., Inc., C.A.Tex. 1979, 604 F.2d 976, affirmed 101S.Ct. 183, 449 U.S. 24, 66 L.Ed.2d 185, certiorary denied 101 S.Ct. 588, 449 U.S. 1021, 66 L.Ed.2d 483.

2. Avoidance of Injustice

(i) The court of appeals had power to order its mandate recalled, and to consider a second petition for rehearing on its merits, where effort to have mandate recalled and petition considered, was brought up at the same term of court in which mandate had been sent down, and a reconsideration of case was necessary to avoid injustice. Sun Oil Co. v. Burford, C.A. Tex. 1942, 130 F.2d

10, reversed on other grounds 63 D.Ct. 1098, 319 U.S. 315, 87 L.Ed.1024, rehearing denied 63 S.Ct. 1442, 320 U.S. 214, 87 L.Ed. 1851.

Conclusions on Circuit Court's Denying Motion to Recall the Mandate, to Prevent a Miscarriage of Justice:

1. The Circuit Court acted contrary to public policy and case law.

2. The Circuit Court's decision is inconsistent with its explanation for affirming summary judgment, that Petitioner failed to show that his transfer was a material adverse employment action. Since Petitioner now proved material future harm, it should have reversed.

3. Petitioner questions the Circuit Court's thoroughness at the swiftness at which his motion was decided: Received on 3/13/2003 and denied on 3/14/2003.

4. Petitioner also questions the unreasonable delay of ten days in notifying him that his motion had been denied.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

S. Herrnreiter

Siegfried Herrnreiter, Petitioner Pro Se

Filing Date: August 23, 2003

U.S. 7th Circuit Court of Appeals Reports

HERRNREITER v. CHICAGO HOUSING AUTH., 315 F.3d 742 (7th Cir. 2002)

SIEGFRIED HERRNREITER, Plaintiff-Appellant

v.

CHICAGO HOUSING AUTHORITY,

Defendant-Appellee.

No. 01-3202.

United States Court of Appeals, Seventh Circuit.

ARGUED OCTOBER 18, 2002.

DECIDED DECEMBER 30, 2002.

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Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 98 C 5209- Rebecca R. Pallmeyer, Judge.

Jamie G. Sypulski (argued), Chicago, IL, Douglas M. Werman, Chicago, IL
for Plaintiff-Appellant.

Before POSNER, DIANE P. WOOD, and EVANS, Circuit Judges.

POSNER, Circuit Judge.

The Chicago Housing Authority's Office of the Inspector General has two divisions, auditing and (field) investigations. The plaintiff in this Title VII case, Siegfried Herrnreiter, is an accountant who was employed in the auditing division.

Investigators traditionally are trained law enforcement officers, such as former police officers or Treasury agents. But the Inspector General decided that it might be helpful in financial investigations if one of the investigators was an auditor, so Herrnreiter was transferred to the investigation division.

He loved being an investigator. He found it more interesting and challenging than auditing, and he also had the use of a car supplied by the CHA and did not have to sign in and out of the office, as he had had to do as an auditor. But the idyll was short-lived. After six months the newly appointed Inspector General, Leonard Odom who had approvedHerrnreiter's transfer to the investigations division several months after it had taken place transferred him back to auditing. A couple of months later Odom fired Herrnreiter, ostensibly for unsatisfactory performance of the auditing tasks that had been assigned to him. Herrnreiter is a white, naturalized U.S. citizen of German origin; Odom is black; and Herrnreiter contends that his transfer back to the auditing division and his subsequent termination were motivated by his race and national origin. The district court granted summary judgment for the housing authority.

Title VII does not forbid every act of invidious discrimination that an employer might commit against an employee; the act must be "with respect to [the employee's] compensation, terms, conditions, or Page 744 privileges of employment." 42 U.S.C. § 2000e-2(a)(1). The cases paraphrase this either as "a tangible employment action," that is, "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits," Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998), or as a "materially adverse employment action," Traylor v. Brown, 295 F.3d 783, 788 (7th Cir. 2002); Haugerud v. Amery School District, 259 F.3d 678, 691 (7th Cir. 2001); see also Ford v. General Motors Corp., 305 F.3d 545, 553 (6th Cir. 2002). Herrnreiter interprets these paraphrases to mean any action that displeases the employee. If he is right, one dirty look would be enough to trigger liability under Title VII. The language that we have quoted from the statute and the case

law does not support his interpretation, but we do not stop there.

The cases that find the statutory criterion (however it should be formulated) satisfied can be divided into three groups:

1. Cases in which the employee's compensation, fringe benefits, or other financial terms of employment are diminished, including, of course, as the limiting case, termination of employment. See, e.g., Simpson v. Borg-Warner Automotive, Inc., 196 F.3d 873, 876 (7th Cir. 1999); Smart v. Ball State University, 89 F.3d 437, 441 (7th Cir. 1996); Greer v. St. Louis Regional Medical Center, 258 F.3d 843, 845-46 (8th Cir. 2001).

2. Cases in which a nominally lateral transfer with no change in financial terms significantly reduces the employee's career prospects by preventing him from using the skills in which he is trained and experienced, so that the skills are likely to atrophy and his career is likely to be stunted. See, e.g., Flaherty v. Gas Research Institute, 31 F.3d 451, 456-57 (7th Cir. 1994); Crady v. Liberty National Bank & Trust Co., 993 F.2d 132, 135-36 (7th Cir. 1993); Collins v. Illinois, 830 F.2d 692, 703-04 (7th Cir. 1987); Rodriguez v. Board of Education, 620 F.2d 362, 366 (2d Cir. 1980); Torre v. Casio, Inc., 42 F.3d 825, 831, 834-35 and n. 7 (3d Cir. 1994). These cases differ from those in the first category only in involving a future rather than present harm; the harm nevertheless is financial. They are to be distinguished from cases involving "a purely lateral transfer, that is, a transfer that does not involve a demotion in form or substance. . . . [Such a transfer] cannot rise to the level of a materially adverse employment action. A transfer involving no reduction in pay and no more than a minor change in working conditions will not do, either." Williams v. Bristol-Myers Squibb Co., 85 F.3d 270, 274 (7th Cir. 1996).

2a. A variant of category 2 is where the employee's job is changed in a way that injures his career just as in the cases in that category except that there is no transfer. See, e.g., Dahm v. Flynn, 60 F.3d 253, 256-57 (7th Cir. 1994); Chuang v. University of California Davis, 225 F.3d 1115, 1125-26 (9th Cir. 2000).

3. Cases in which the employee is not moved to a different job or the skill requirements of his present job altered, but the conditions in which he works are changed in a way that subjects him to a humiliating, degrading, unsafe, unhealthful, or otherwise significantly negative alteration in his workplace environment-an alteration that can fairly be characterized as objectively creating a hardship, the classic case being that of the employee whose desk is moved into a closet. See, e.g., Smart v. Ball State University, supra, 89 F.3d at 441 n. 1; Durham Life Ins. Co. v. Evans, 166 F.3d 139, 152-53 (3d Cir. 1999); Parrish v. Immanuel Medical Center, 92 F.3d 727, 731-32 (8th Cir. 1996) Page 745 see also Spring v. Sheboygan Area School District, 865 F.2d 883, 885-86 (7th Cir. 1989); Meyer v. Brown & Root Construction Co., 661 F.2d 369, 372 (5th Cir. 1981); cf. Parrett v. City of Connersville, 737 F.2d 690, 693-94 (7th Cir. 1984). This category includes cases of constructive discharge: the employer has made the job unbearable for the employee. E.g., id.; EEOC v. University of Chicago Hospitals, 276 F.3d 326, 331-32 (7th Cir. 2002); Lindale v. Tokheim Corp., 145 F.3d 953, 955 (7th Cir. 1998). It also includes cases of harassment: mistreatment of an employee by coworkers or supervisors that is sufficiently severe to worsen substantially his conditions of employment as they would be perceived by a reasonable person in the position of the employee. Faragher v. City of Boca Raton, 524 U.S. 775, 786-88 (1998); Hilt-Dyson v. City of Chicago, 282 F.3d 456, 462-63 (7th Cir. 2002). Categories 2, 2a, and 3 often overlap. See, e.g., Collins v. Illinois, supra, 830 F.2d at 703-04.

What remains are cases of purely subjective preference for one position over another-which is this case. An auditor's job is not objectively inferior to an investigator's job that has identical financial terms; nor is an accountant who is transferred from investigations to audits deprived of the opportunity to use the skills for which he is trained the opposite is the case. The use of a company car and being excused from having to sign in or out of an office might be preferred by some employees, but not having to run around all day might be considered by others ample compensation for giving up those particular perks. The two jobs were equivalent other than in idiosyncratic terms that do not justify trundling

out the heavy artillery of federal anti-discrimination law; "otherwise every trivial personnel action that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit. The Equal Employment Opportunity Commission, already staggering under an avalanche of filings too heavy for it to cope with, would be crushed, and serious complaints would be lost among the trivial." Williams v. Bristol-Myers Squibb Co., supra, 85 F.3d at 274; see also Burger v. Central Apartment Management, Inc., 168 F.3d 875, 879 (5th Cir. 1999) (per curiam); Brown v. Brody, 199 F.3d 446, 457 (D.C. Cir. 1999); Forkkio v. Powell, 306 F.3d 1127, 1130-31 (D.C. Cir. 2002).

Out of caution we note that some of the cases we have cited because they contain good discussions of when an adverse employment action is actionable were actually cases involving retaliation. We do not mean to suggest by such citations that retaliation, to be actionable under Title VII (or other statutes), has to involve an adverse employment action. It does not. Aviles v. Cornell Forge Co., 183 F.3d 598, 605-06 (7th Cir. 1999), 241 F.3d 589, 593 (7th Cir. 2001); Passer v. American Chemical Society, 935 F.2d 322, 331-32 (D.C. Cir. 1991); EEOC Compliance Manual § 8, ¶ 8008 (1998) (directive No. 915.003); see also Veprinsky v. Fluor Daniel, Inc., 87 F.3d 881, 891-92 (7th Cir. 1996). Some cases reach this conclusion by interpreting "adverse employment action" in the retaliation context as not requiring an actual employment action; an example is Berry v. Stevinson Chevrolet, 74 F.3d 980, 986-87 (10th Cir. 1996), where the retaliation took the form of preferring charges of theft and forgery against an employee who had filed a charge of discrimination. See also Ray v. Henderson, 217 F.3d 1234, 1242-43 (9th Cir. 2000). As we explained in McDonnell v. Cisneros, 84 F.3d 256, 258-59 (7th Cir. 1996), "No limiting language appears in Title VII's retaliation provision. 42 U.S.C. § 2000e-3(a). The language of `materially adverse employment action' that some courts employ in retaliation cases is a paraphrase of Title VII's basic prohibition against employment Page 746 discrimination, found in 42 U.S.C. § 2000e-2(a)(1) and (2). . . . The provision regarding retaliation may intentionally be broader, since it is obvious that effective retaliation against employment discrimination need not take the form of a job action." We left

open in that case the question whether retaliation in other forms was actionable under Title VII, remarking that "shooting a person for filing a complaint of discrimination would be an effective method of retaliation, though . . . the victim of the retaliation would have other, and more powerful, remedies than a suit under Title VII. This would be a reason for confining the provision to retaliation that takes the form of an adverse job action." Id. at 259. The cases cited earlier in this paragraph have now resolved the issue by holding that the provision is not so confined.

But what if the retaliation does take the form of an employment action: must that action be as severe as would be required if the action were charged as discrimination rather than as retaliation? The cases like Berry that define adverse employment action more broadly in the retaliation context implicitly answer "no," though many cases state or more commonly assume that the answer is "yes." See, e.g., Spearman v. Ford Motor Co., 231 F.3d 1080, 1086 (7th Cir. 2000); Heuer v. Weil-McLain, 203 F.3d 1021, 1023 (7th Cir. 2000); Fortier v. Ameritech Mobile Communications, Inc., 161 F.3d 1106, 1111 n. 7 (7th Cir. 1998); Rabinovitz v. Pena, 89 F.3d 482, 488-89 (7th Cir. 1996); Fierros v. Texas Dept. of Health, 274 F.3d 187, 191, 193 (5th Cir. 2001); Robinson v. City of Pittsburgh, 120 F.3d 1286, 1300 (3d Cir. 1997). That may be a welcome simplification, but it can be criticized especially in cases in which an employee is retaliated against for making or more commonly assisting a complaint on behalf of a coworker, see, e.g., Rucker v. Higher Educational Aids Board, 669 F.2d 1179, 1182 (7th Cir. 1982); Johnson v. University of Cincinnati, 215 F.3d 561, 580-81 (6th Cir. 2000); Weiss v. Parker Hannifan Corp., 747 F. Supp. 1118, 1130 (D.N.J. 1990), as it presumably takes rather little to deter such altruistic action, which is nevertheless protected by the statute. We are not aware that any of the decisions that equate the standards for discrimination and retaliation involved a third-party complaint. This is not an issue to be resolved in this case, however, which does not involve retaliation, and we mention it only to emphasize that in citing retaliation cases for their discussion of what "materially adverse employment action" means we do not necessarily endorse the view that such an

action is always required to make retaliation actionable under Title VII.

Although the transfer of Herrnreiter back to the audit division was not actionable under Title VII, we must consider the discharge that followed; obviously that was a materially adverse employment action. Herrnreiter argues that he was "set up" by Odom to fail by being given tasks that he could not be expected to complete within the prescribed deadlines and then being fired when he failed to make them. This is a perfectly good theory of discrimination, see, e.g., McPhaul v. Board of Commissioners, 226 F.3d 558, 565 (7th Cir. 2000); Shager v. Upjohn Co., 913 F.2d 398, 405 (7th Cir. 1990); Danzer v. Norden Systems, Inc., 151 F.3d 50, 54-55 (2d Cir. 1998); Stacks v. Southwestern Bell Yellow Pages, 27 F.3d 1316, 1325-26 (8th Cir. 1994), but it is not supported by the facts. Herrnreiter admits having had more experience as an auditor than the other employees in the audit division and it was natural therefore that he would be given challenging tasks, but the tasks he was given and failed to complete were standard auditing tasks rather than the labors of Hercules. There were deadlines, but they were not rigid; so far as appears, had he Page 747 reported progress they would have been extended. The likeliest inference from the facts developed in the summary judgment proceeding is that he was sulking because of having been transferred back to the audit division, losing the car and the freedom of an investigator. He admitted in his deposition that "he probably gave up" trying to satisfy his superiors' demands, though they appear to have been reasonable.

Although as we saw earlier Herrnreiter's transfer from the investigation division back to the audit division was not actionable, were there evidence that Odom made the transfer because of Herrnreiter's race or national origin this would be usable as evidence that Herrnreiter's subsequent termination by Odom was the second step of a two-step adverse employment action that was invidiously motivated. Mathewson v. National Automatic Tool Co., 807 F.2d 87, 91 (7th Cir. 1986); cf. Oest v. Illinois Dept. of Corrections, 240 F.3d 605, 613-14 (7th Cir. 2001); Becker v. ARCO Chemical Co., 207 F.3d 176, 194 n. 8 (3d Cir. 2000). We do not agree with the

defendant that this claim is blocked by the so-called "common actor" presumption. When the same person hires and later fires the employee who claims that his firing was discriminatory, judges are skeptical, because why would someone who disliked whites, or Germans, or members of some other group to be working for him have hired such a person in the first place? See, e.g., Rand v. CF Industries, Inc., 42 F.3d 1139, 1147 (7th Cir. 1994); Bradley v. Harcourt, Brace & Co., 104 F.3d 267, 270-71 (9th Cir. 1996); Proud v. Stone, 945 F.2d 796, 797 (4th Cir. 1991). It is misleading to suggest (as some cases do, see, e.g., Roberts v. Separators, Inc., 172 F.3d 448, 452 (7th Cir. 1999); Brown v. CSC Logic, Inc., 82 F.3d 651, 658 and n. 25 (5th Cir. 1996); Blankerts v. V. Gladieux Enterprises, 197 F. Supp.2d 956, 961-62 (N.D.Ohio. 2002); cf. Bradley v. Harcourt, Brace & Co., supra, 104 F.3d at 270-71) that this skepticism creates a "presumption" of non-discrimination, as that would imply that the employee must meet it
or lose his case. It is just something for the trier of fact to consider. See Stalter v. Wal-Mart Stores, Inc., 195 F.3d 285, 291 n. 3 (7th Cir. 1999); Johnson v. Zema Systems Corp., 170 F.3d 734, 744-45 (7th Cir. 1999); Waldron v. SL Industries, Inc., 56 F.3d 491, 496 n. 6 (3d Cir. 1995); cf. Kadas v. MCI Systemhouse Corp., 255 F.3d 359, 361 (7th Cir. 2001). It is out of place in this case, because while Odom approved Herrnreiter's transfer to the investigation division, the transfer had been decided by Odom's predecessor and had actually taken place months before Odom's approval. That approval was only the weakest kind of evidence that he actually "wanted" Herrnreiter in investigations.

But Herrnreiter still must lose, as there is no evidence that his race or national origin played a role in his transfer back from investigations to audits. It is true that he received a highly positive performance rating for his few months as an investigator. But appointing a person inexperienced in law enforcement to be an investigator was an experiment and there is irrefutable evidence that it failed because Herrnreiter did not have proper techniques for interviewing witnesses and did not mend his ways in response to criticisms and directives from his superiors. It is true that he was replaced by a black person when he was transferred, but it is also true that

a black investigator terminated for unsatisfactory performance shortly after Herrnreiter's transfer was replaced by a white.

There is a further point. At argument, his lawyer had no opinion when asked whether, had Herrnreiter not been transferred to investigations in the first place but had remained in the audit division, Page 748 Odom would have "set him up to fail." In other words, Herrnreiter's own lawyer is agnostic on whether, had it not been for the transfer, Herrnreiter would still be employed by the housing authority as an auditor despite his race and national origin. But if he would be, what improper motive could be assigned to Odom in firing him? None of the auditors was black when Herrnreiter rejoined the audit staff; and there is no evidence as to whether Herrnreiter was replaced and if so by a white or a black-while until Herrnreiter became an investigator, all the investigators were black. Even if we suppose that Odom wanted to keep the investigative staff all black and that's why he transferred Herrnreiter back to audits, Herrnreiter's lawyer does not argue that Odom wanted to change the racial composition of the audit staff and if this is so then Herrnreiter must indeed have been fired either because his performance was unsatisfactory or for some other reason unrelated to his race.

AFFIRMED.

HERRNREITER v. CHICAGO HOUSING AUTHORITY, (N.D.Ill. 2001)

SIEGFRIED HERRNREITER, Plaintiff, v. CHICAGO HOUSING AUTHORITY,

Defendant.

No. 98 C 5209

United States District Court, N.D. Illinois, Eastern Division

July 30, 2001

MEMORANDUM OPINION AND ORDER

REBECCA R. PALLMEYER, U.S. District Judge.

App. 10. Plaintiff Siegfried Herrnreiter ("Herrnreiter"), a naturalized U.S. citizen of German national origin, was employed as an auditor by Defendant Chicago Housing Authority ("CHA") until his unsatisfactory work performance resulted in his discharge in 1996. Herrnreiter has filed this action against CHA under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000, et seq. His complaint as amended consists of four counts: Count I is a claim for harassment based on his national origin; Count II is a claim for racial discrimination; Count III is a claim for national origin discrimination; and Count IV is a claim for retaliation. CHA now moves for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. For the reasons set forth below, CHA's motion is granted.

FACTS

Plaintiff has a bachelor's degree in accounting and is a certified public accountant and a certified internal auditor. (Defendant's Rule 56.1 (a)(3) Statement (hereinafter "Def.'s 56.1 St.") ¶ 6.) He began his employment as a Senior Auditor in the CHA's Office of the Inspector General (hereinafter "OIG") on

April 20, 1992. (Id. ¶¶ 7, 8.) The OIG consists of two departments, auditing and investigations. (Id. ¶ 9.) These departments are responsible for analyzing and investigating possible incidents of fraud, waste, and abuse within the CHA. Id.) Altogether, in 1996, the OIG employed five investigators and three auditors. (Defendant's Rule 56.1(A) Reply to Plaintiffs Statement of Additional Facts (hereinafter "Def.'s 56.1 Reply") ¶¶ 1-2.)

Plaintiff presents no evidence of friction in the first few years of his employment, but he complains that by 1995 he began to suffer harassment on the basis of his race and national origin. In support of this claim, Plaintiff points, first, to an incident that occurred on April 7, 1995, when Abel Turrubiartes, OIG's Chief Auditor, was speaking with a staff auditor, Virma Rodriguez, a woman of Filipino heritage. (Def.'s 56.1 St. ¶ 19.) While Plaintiff did not personally witness the conversation, he claims that Rodriguez told him that Turrubiartes referred to naturalized citizens as foreigners and told Rodriguez that he did not want to hire them because he did not want to end up "with another Siegfried [Herrnreiter] or Virma [Rodriguez]." (Plaintiffs Deposition (hereinafter "Pl.'s Dep."), at 60.) About a month later, in a conversation with Herrnreiter on June 21, 1995, Turrubiartes observed, "You know, you have a funny accent." (Plaintiffs Amended Complaint ¶ 15.) On November 1, 1995, Martin Melinger, CHA's Deputy Inspector General and Plaintiffs supervisor, told Plaintiff that he could not understand a word Plaintiff was saying and proceeded to use Jerial Howard, the OIG's Chief Investigator, as an interpreter. (Plaintiffs Local Rule 56.1(b) (3)(B) Statement of Additional Material Facts (hereinafter "Pl. St. of Add'l Facts") ¶ 18.) Finally, Plaintiff asserts that on May 3, 1996, as he was in the process of moving from his cubicle in the auditing section of the OIG to a cubicle closer to investigations, Turrubiartes said to him, "Ahh. I know why you are moving. Sneaky." (Ex. 7 to Pl.'s Dep.) Plaintiff admits that being called "sneaky" does not have anything to do with his German heritage, but he did write a memorandum to Howard and Odom to complain about the comment, calling it "abusing and provoking." (Pl.'s 56.1 Response ¶ 82; Pl.'s Dep., at 119-20.)

In early 1996, Plaintiff was transferred within the OIG from his auditor position to the position of investigator. (Def.'s 56.1 St. ¶ 21.) According to CHA's personnel policies, employees who are transferred to another position within CHA are on probationary status for six months after their transfer is completed. (Id. ¶ 30.) An employee on probationary status can be terminated from his or her position for any reason. (Id.) When Plaintiff was first transferred to the position of investigator, he was the only white, foreign born investigator; all of the other investigators, including his supervisor, were African American. (Pl. St. of Add'l Facts ¶¶ 1.1, 1.3, 1.4).

According to Plaintiff, he was transferred to the investigator position in January of 1996 by Hubert Holton, the then outgoing Inspector General of CHA. (Plaintiffs Local Rule 56.1(b)(3)(A) Response to Defendant's 56.1(a)(3) Statement (hereinafter "Pl.'s 56.1 Response") ¶ 25.) According to Defendant, however, Holton had attempted to initiate Herrnreiter's transfer, but, as an outgoing supervisor, he did not have the authority to take personnel actions at that time. (Def.'s 56.1 Statement ¶ 25.) Instead, Defendant contends that Plaintiff was not transferred until March 1996, when Leonard Odom replaced Hubert Holton as the Inspector General. (Def.'s 56.1 ¶¶ 10, 28.) At that time, Odom met with Joseph Shuldiner, the CHA's executive director. (Id. ¶ 25.) Shuldiner told Odom that Holton had attempted to initiate a lateral transfer of Herrnreiter.[fn1] (Id.) After meeting with Shuldiner, Odom conferred with Jeriel Howard, the OIG's Chief Investigator, to determine whether Herrnreiter should be transferred to investigations. (Id. ¶ 26.) Howard encouraged Odom to proceed with the transfer and assured Odom that he (Howard) would work closely with Herrnreiter to ensure that Herrnreiter learned to do investigations properly. (Id.) Based on Howard's assurances as well as Herrnreiter's educational background, Odom approved the transfer on March 27, 1996. (Id.) The paperwork documenting the transfer indicated that the change in position was a "lateral" change from a Grade 16 position to another Grade 16 position. (Ex. 3 to Odom Dep.)[fn2]

As with Plaintiffs transfer date, his performance as an investigator is also disputed. Both Odom and Howard were of

the opinion that Plaintiff was capable of doing good work if he followed instructions. (Odom Dep., at 22, 36.) The CHA asserts, however, that on several occasions Plaintiff ignored specific instructions given to him by Odom and Howard. (Def.'s 56.1 St. ¶¶ 33-41.) This alleged failure to follow orders resulted in Plaintiffs receiving a rating of "2" for "does not meet expectations" in the category of "communicates effectively and accurately in both verbal and written form" on his performance evaluation of July 31, 1996, despite his overall rating of 3.96 (out of 5), signifying that he performed "above expectations." (Id. ¶¶ 44-46; Pl.'s 56.1 Response ¶ 58.) Howard wrote and signed the evaluation as Herrnreiter's supervisor, while Odom concurred with Howard's evaluation and signed the evaluation on the line marked "concurrence." (Ex. 12 to Pl.'s Dep.) Odom then made the decision to transfer Plaintiff back to the audit division. (Def.'s 56.1 St. ¶ 42.)

For his part, Plaintiff denies that he failed to follow instructions when he was working as an investigator. (Pl.'s 56.1 Response ¶¶ 35-40.) Rather, Plaintiff argues that the low rating he received in the communications category of the evaluation was merely an excuse for transferring him back to the auditor position. (Plaintiffs Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment (hereinafter "Pl's Memorandum"), at 6.) In support of this contention, Plaintiff points out that Howard presented no documents to support Plaintiffs grade of "2" on communication. (Pl.'s 56.1 Response ¶ 45.) Plaintiff also notes that he had received satisfactory ratings in communication skills in 5 prior performance reviews while he was a Senior Auditor. (Id. ¶ 51; Pl.'s St. of Add'l Facts ¶ 25.3.) Additionally, Plaintiff alleges that when he went to Odom's office to discuss the performance evaluation, Odom greeted him by saying, "Jawohl, what's up?"[fn3] (Def.'s 56.1 St. ¶ 85.) Plaintiff also contends that Odom originally told him he was being reassigned not because he failed to follow instructions, but because he lacked a law enforcement background. (Pl.'s St. of Add'l Facts ¶ 45.) Finally, Plaintiff notes that when he was transferred back to his position of auditor, he was replaced by an African American man, Arthur White. (Pl.'s 56.1 Response ¶ 52.) He admits, however, that there are currently two white investigators, Thomas Hoffman and Berle Litman, both of

whom were hired after he was transferred back to his position as auditor. (Id.)

Regardless of the reason for Plaintiffs transfer back to his former position, both parties agree that he was reassigned to the position of auditor on September 9, 1996, and that Odom made the decision to transfer him back. (Id. ¶¶ 42, 59.) According to Defendant, that transfer occurred within the six month probationary period for all newly transferred persons; according to Plaintiff, that period ended two months earlier. (Pl.'s St. Add'l Facts ¶ 11.)[fn4] Both agree that the reassignment did not involve a reduction in Plaintiffs pay. (Id. ¶ 43.) Plaintiff points out, however, that he did enjoy some additional benefits as an investigator — including a company car, more time spent in the field as opposed to the office, more freedom, independence, responsibility, higher status and a greater variety of jobs — which he had to relinquish when he went back to his position as an auditor. (Pl.'s 56.1 St. ¶¶ 24(a) — (e), 43.)

Immediately after being reassigned to the auditor position, Plaintiff was told that his supervisor would be Martin Melinger, the Deputy Inspector General. (Def.'s 56.1 St. ¶ 62.) Shortly thereafter, however, Melinger informed Odom that Melinger was going to retire and the two men agreed that Turrubiartes should supervise Herrnreiter. (Odom Dep., at 56-67.)

Upon his return to auditor, Turrubiartes assigned Herrnreiter the task of reviewing each audit issued by the OIG in the first eight months of 1996. (Ex. 18 to Pl.'s Dep.) Turrubiartes was not satisfied with Herrnreiter's initial progress on the project, and, on September 30, 1996, Turrubiartes told Herrnreiter that Herrnreiter was probably a week behind schedule. (Pl's Dep., at 197-98.) Herrnreiter admits that he was probably seven days behind schedule but alleges that Turrubiartes' deadline for the project was unrealistically truncated. (Pl.'s 56.1 Response ¶¶ 67-68.)

As a result of falling behind schedule on the project, Plaintiff was placed on a thirty-day Corrective Action Plan (hereinafter "CAP") on October 2, 1996. (Def.'s 56.1 St. ¶ 69.) The plan was

written by Turrubiartes at Odom's suggestion and approved by Odom. (Id.) According to the CAP, Herrnreiter had failed to properly perform several steps of the follow up audit project. (Id. ¶ 71.) Specifically, the project required Herrnreiter to develop a general audit program that would serve as a guide and also to develop specific audit programs to determine the status of each of the OIG's prior audit recommendations. (Id.) The CAP explained that Herrnreiter had taken far too long to draft both the general audit program and each specific program. (Id. ¶ 72.) For instance, Turrubiartes noted that, although Herrnreiter had been given a full week in which to develop five specific audit programs, only one of them had been completed in that time. (Ex. 22 to Pl.'s Dep., at 1.) Further, Turrubiartes noted that Herrnreiter's specific audit programs were improperly drafted because they did not allow Herrnreiter to verify that the CHA programs being audited had instituted the OIG's prior audit recommendations. (Def.'s 56.1 St. ¶ 72.) Moreover, the CAP criticized Herrnreiter's performance in conducting several individual audits on grounds that Herrnreiter had failed to ask auditees appropriate questions and had failed to document his discussions with auditees completely and accurately. (Id.) For example, Turrubiartes noted in the CAP that, after being instructed to perform three follow-up audits concerning insurance policy matters, Herrnreiter had neglected to ask questions that were necessary to determining whether recommendations in the initial audit report had actually been implemented. (Ex. 22 to Pl.'s Dep., at 3-4.) Furthermore, Turrubiartes claimed that Herrnreiter had failed to take adequate notes at the meeting. (Id.) On October 8, 1996, Turrubiartes memorialized his dissatisfaction with Herrnreiter's performance in a memorandum detailing several of these task that Herrnreiter had failed to complete. (Ex. 32 to Pl.'s Dep.)

Plaintiff claims, however, that the CAP was a "sham" utilized by Defendant to facilitate his termination and that similarly situated black employees were not terminated despite equal or worse performance. (Pl.'s 56.1 Response ¶¶ 69-74.) He also claims that his CAP assignment, preparing audit programs, was "out of the ordinary," since this work had always been reserved for the audit supervisor or manager. (Pl.'s 56.1 St. of

Add'l Facts ¶ 36.6.) Defendant disputes Plaintiffs characterization of the CAP, contending it is based solely on his own opinion, and further points out that Plaintiff himself testified that "he was trained and qualified to prepare an audit program." (Def.'s 56.1 Reply ¶ 36.6)

After Herrnreiter was placed on the CAP, he submitted three successive drafts of a follow up audit report on the cancellation of certain life insurance policies, all of which were reviewed by Turrubiartes and returned to Herrnreiter with handwritten comments and editorial suggestions. (Exs. 29-31 to Pl.'s Dep.) On each draft, Turrubiartes wrote that Herrnreiter had improperly relied on an "assurance" from an auditee that a correction was being implemented. (Id.) For instance, at the top of the first draft that Turrubiartes returned to Herrnreiter, Turrubiartes wrote:

> How can you [Herrnreiter] as an auditor rely on verbal "assurances' by anyone as the basis for saying whether something is right, proper, correct, or not? We are not in the business of accepting `assurances.' Quite the contrary, we are in the business of verifying, confirming, validating, etc., data in a manner [that] ensures and assures [sic] the facts.

(Ex.. 29 to Pl.'s Dep.) Herrnreiter's subsequent drafts also proved unacceptable to Turrubiartes, and Herrnreiter's inadequate work on the assignment culminated in an exasperated Turrubiartes marking up the third and final draft with comments like "No further drafts will be requested of Siegfried because there has been little if any improvement" and "Siegfried: I am not your proofreader." (Ex. 31 to Pl.'s Dep.) At his deposition, Herrnreiter agreed that the third draft "probably [was] not acceptable" and that he "probably gave up at that point." (Pl.'s Dep., at 295.)

Similarly, on October 7, 1996, Turrubiartes instructed Herrnreiter to meet with an employee in the CHA's risk management department to discuss a related issue on insurance policies. (Ex. 32 to Pl.'s Dep.) Herrnreiter failed to meet with the employee and explained to Turrubiartes that he had forgotten to do so. (Id.) With regard

to this assignment, Herrnreiter stated that it is "possible that I maybe didn't cover this in the fashion Mr. Turrubiartes expected." (Pl.'s Dep., at 306-07.)

On October 10, 1996, Odom instructed Turrubiartes to confer with the CHA's human resource department on whether CHA was required to give Herrnreiter the full thirty days to comply with the CAP. (Def.'s 56.1 St. ¶ 79.) Both Odom and Turrubiartes concluded that Herrnreiter was not making a good faith effort to satisfy the CAP. (Odom Dep., at 212-13.) Armetta Reed of the human resource department informed Turrubiartes and Odom that Herrnreiter could be terminated from his job before the thirty days had elapsed if Herrnreiter was not making a good faith effort to fulfill the requirements of the CAP. (Id., at 231.) Armed with this information, Odom made the decision to terminate Herrnreiter's employment on October 25, 1996. (Def.'s 56.1 St. ¶ 79.)

DISCUSSION

I. Summary Judgment Standard in Employment Cases

Summary judgment is appropriate only when "the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c); see also Flores v. Preferred Tech. Group, 182 F.3d 512, 514 (7th Cir. 1999). A party opposing summary judgment must do more than raise "metaphysical doubt" about the presence of a genuine issue of material fact. Miranda v. Wisconsin Power & Light Co., 91 F.3d 1011, 1016 (7th Cir. 1996). The non-moving party must demonstrate through specific factual allegations that there is a genuine issue of material fact that requires a trial. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). With this standard in mind, the court will analyze CHA's motion for summary judgment on Herrnreiter's claim of harassment based on national origin, his claims of race and national origin discrimination, and his retaliation claim.

II. Harassment Based on National Origin

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . national origin." 42 U.S.C. § 2000e-2 (a)(1). This language is not limited to economic or tangible discrimination. Harris v. Forklift Sys., 510 U.S. 17, 21 (1993). Discrimination with respect to "terms, conditions, or privileges of employment" includes requiring people to work in a discriminatorily hostile or abusive work environment. Id. A hostile work environment exists when the conduct at issue has the purpose or effect of "unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment." Filipovic v. K & R Express Sys., Inc., 176 F.3d 390, 397 (7th Cir. 1999) (quoting Mentor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986)).

Not all unpleasant working conditions meet the test, however. "[R]elatively isolated instances of nonsevere misconduct will not support a claim of a hostile environment." Ngeunjuntr v. Metro. Life Ins. Co., 146 F.3d 464, 467 (7th Cir. 1998). Rather, Title VII protects a worker against conduct that is sufficiently severe or pervasive that a reasonable person would find it hostile and that the victim himself subjectively sees as hostile. Id. Whether an objectively hostile environment exists is a question of law. Hardin v. S.C. Johnson & Son, Inc., 167 F.3d 340, 345 (7th Cir. 1999). The factors to be considered include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Harris, 510 U.S. at 23.

For example, in Filipovic v. K & R Express Sys., 176 F.3d 390, 392 (7th Cir. 1999), plaintiff Filipovic alleged that he was subjected to discrimination and harassment based upon his national origin. Specifically, Filipovic, who was originally from Yugoslavia, alleged that some of his co-workers and supervisors called him names such as "fucking foreigner" and "Russian dick head," and that one supervisor commented,

with respect to the civil war in Yugoslavia, that "it seems to me all Serbians are barbarians." Id. at 393. The court, considering only those comments that occurred within the relevant statutory time frame, concluded that there were four such national origin-related comments made over the course of more than a year. Id. at 398. In holding that Filipovic had not established a hostile work environment claim, the court pointed out that, though Plaintiff had shown the comments were made because of his national origin, the comments were few in number, were not physically threatening, were spread out over more than a year, and were relatively mild. Id. Thus, the court determined that such comments were more akin to the "relatively isolated instances of nonsevere misconduct" that do not constitute a hostile work environment. Id.

Similarly, Herrnreiter has not alleged conduct either severe or pervasive enough to constitute an objectively hostile work environment. Herrnreiter's hostile work environment claim rests on the following five alleged acts of harassment based on his German national origin:

(1) April 7, 1995 — Turrubiartes, while speaking to Rodriguez, purportedly referred to naturalized citizens as "foreigners" and said that he did not want to hire them because he did not want to end up "with another Siegfried [Herrnreiter] or Virma [Rodriguez]."(Def.'s 56.1 St. ¶ 19.)

(2) June 21, 1995 — Turrubiartes told Herrnreiter that he had "a funny accent." (Id. ¶ 20.)

(3) November 1, 1995 — Melinger, Plaintiffs supervisor at the time, told Plaintiff that he could not understand him and proceeded to use Howard as an interpreter. (Pl's St. of Add'l Facts ¶ 18.)

(4) May 3, 1996 — Turrubiartes called Herrnreiter "sneaky." (Id. ¶ 81.)

(5) August 16, 1996 — Odom greeted Herrnreiter in German by saying, "Jawohl." (Id. ¶ 85.)[fn5]

As with the comments made to Filipovic, the comments made to Herrnreiter were made over more than a year in his case, eighteen months. Five incidents over such an extended duration are insufficient to constitute actionable harassment. Additionally, the comments set forth above were not severe enough to constitute actionable harassment. Herrnreiter himself did not hear the first comment and offers only hearsay evidence that such a comment was even made. As to Turrubiartes "sneaky" comment, Herrnreiter admitted that the comment did not relate to his national origin, nor can this court understand how such a comment could be construed in such a way. See Pl.'s 56.1 Response ¶¶ 82, 83. The last three comments (use of "Jawohl" and references to Plaintiffs accent) are arguably related to Herrnreiter's national origin, but, like the comments lodged against Filipovic, they were relatively mild, were not physically threatening, and could not be said to unreasonably
interfere with Herrnreiter's work performance. Accordingly, CHA's motion for summary judgment on the harassment claim is granted.

III. Discrimination Based on Race and National Origin

In addition to his harassment claim, Herrnreiter contends his managers discriminated against him based on his race and national origin when they transferred him back to the auditor position and, later, terminated him. A plaintiff can prove a claim of race discrimination or national origin discrimination under Title VII by offering direct evidence of discriminatory intent or by proceeding under the familiar burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). In opposing CHA's motion for summary judgment, Herrnreiter has chosen to proceed under the latter paradigm. To survive a motion for summary judgment under McDonnell Douglas, Herrnreiter must first establish a prima facie case of discrimination by producing evidence that tends to show that: (1) he is a member of a protected class; (2) he performed his job satisfactorily; (3) he suffered a materially adverse employment action; and (4) he was treated less favorably than similarly-situated employees outside of his protected class. Gonzalez v. Ingersoll Mill. Mach. Co., 133 F.3d 1025, 1032 (7th Cir. 1998). If Herrnreiter

can establish a prima facie case, the burden then shifts to CHA to establish a legitimate, nondiscriminatory reason for the adverse employment action. See Kulumani v. Blue Cross Blue Shield Ass'n, 224 F.3d 681, 684 (7th Cir. 2000). If CHA does so, Herrnreiter must come forward with evidence that indicates that CHA's stated reason for the action was merely a pretext for unlawful discrimination. Id.

A. Herrnreiter's Reassignment

Herrnreiter cannot establish a prima facie case of intentional race or national origin discrimination stemming from his reassignment to auditor because he cannot show that the reassignment to auditor was a materially adverse employment action. A materially adverse action occurs when an employee is "fired or demoted, suffers a decrease in benefits or pay, or is given a significantly lesser job." Hill v. Am. Gen. Fin., Inc., 224 F.3d 681, 645. A purely lateral transfer does not constitute a materially adverse employment action. Williams v. Bristol - Meyers Squibb Co., 85 F.3d 270, 274 (7th Cir. 1996). Furthermore, a plaintiffs own perceptions regarding the prestige of a position are insufficient, absent other evidence, to establish a materially adverse employment action. Flaherty v. Gas Research Inst., 31 F.3d 451, 457 (7th Cir. 1994).

In Herrnreiter's case, his reassignment did not involve a decrease in pay. (Def.'s 56.1 St. ¶ 43.) Furthermore, all of the paperwork documenting his initial transfer from auditor to investigator indicates that the transfer was purely a lateral one. (Ex. 3 to Odom-Dep.) In support of his contention that the reassignment was in fact a materially adverse job action, Herrnreiter offers only his opinion that the investigator position was more desirable than the auditor position because it included more time spent in the field as opposed to the office, more freedom and independence, more responsibility and variety, a higher status, and a company car. At his deposition, for instance, Herrnreiter testified as follows:

Q. Do you consider the investigator job an advancement?

A. It was an advancement for me.

Q. Why?

A. Since I love to work with people, I love to do investigations, I know I was competent doing it, and I also had the results. . . . I enjoyed also working with a team of professionals, and I think they knew what they were doing, and I really enjoyed being a part of it.

Q. Is the investigator position a promotion over your senior auditor position?

A. Not otherwise, but I enjoyed working on cases which were of short duration; yet, still important that they had to be done and I think this was one of the reasons why I was so successful because I enjoyed what I was doing.

(Pl.'s Dep., at 405-06) (emphasis added). According to Herrnreiter's testimony, his reassignment to auditor was a demotion simply because he found the investigator position more enjoyable. Such subjective perceptions regarding the status of a position will not suffice to establish a materially adverse job action.[fn6] Accordingly, the court concludes that Herrnreiter cannot establish a prima facie case of discrimination in his reassignment to auditor because that reassignment was not a materially adverse job action.

Even if Herrnreiter were able to establish a prima facie case of discrimination, his claim would nonetheless founder due to his failure to provide evidence from which a reasonable jury could conclude that CHA's reason for reassigning him was pretextual. According to CHA, at the time Herrnreiter was transferred back, he was on probationary status for the investigator position and could be terminated for any (legal) reason. Even accepting Herrnreiter's contention, however, that he was transferred to the position in January of 1996 and was, therefore, not on any such probationary status, CHA has presented a facially nondiscriminatory reason for reassigning Herrnreiter: namely, that Herrnreiter repeatedly failed to follow instructions when he was an investigator. (Def.'s 56.1 St. ¶ 32.) The burden therefore shifts to Herrnreiter to produce

evidence from which a jury could find that this legitimate reason offered by CHA was not its true reason but rather a pretext for discrimination.

A pretext is "a lie or a phony reason for an employment decision." Baron v. City of Highland Park, 195 F.3d 333, 341 (7th Cir. 1999). The issue of pretext "does not address the correctness or desirability of reasons offered for employment decisions. Rather, it addresses the issue of whether the employer honestly believes in the reasons it offers." McCoy v. WGN Cont'l Broad. Co., 957 F.2d 368, 373 (7th Cir. 1992). In reviewing CHA's decision to reassign Herrnreiter to auditor, this court will not act as a "super-personnel department," reevaluating Herrnreiter's performance, but will ask only whether CHA honestly believed its proffered reasons for transferring Herrnreiter. Ghosh v. Indiana Dep't of Envtl. Mgmt., 192 F.3d 1087, 1093 (7th Cir. 1999).

In assessing whether Herrnreiter can demonstrate pretext, the court must also consider the inference of non-discrimination that arises in circumstances such as this, in which Herrnreiter was transferred and then reassigned by the same person (Odom) within a short period of time. Such facts give rise to the "common actor" presumption of nondiscrimination — that is, the presumption that a person who hires an individual of a particular protected class (in this case, a person of German origin) would not get rid of the same employee as a result of a sudden aversion to persons of that group. See Roberts v. Separators, Inc., 172 F.3d 448, 452 (7th Cir. 1999) (applying the "common actor" presumption to affirm summary judgment in age discrimination case). Although the presumption is not irrebuttable, it does create a "strong inference" that discrimination was not the motivating factor. Id. at 452. Here, the court finds it unlikely that Odom, who approved Herrnreiter's initial transfer to investigator in March 1996, would develop a distaste for Herrnreiter's race and national origin only five months later.[fn7] Keeping this inference in mind, the court reviews Herrnreiter's evidence of pretext.

In response to CHA's stated reason that Herrnreiter was reassigned because he failed to follow instructions,

Herrnreiter points out that at the time he was reassigned, Odom told him the reason was that he lacked a law enforcement background. (Plaintiffs Memorandum, at 7.) Herrnreiter contends that these inconsistent reasons given by CHA for his reassignment are sufficient to establish pretext. (Id.) The court notes, however, that both of the two reasons are legitimate and nondiscriminatory. Nor is it readily apparent that the two stated reasons Herrnreiter characterizes as inconsistent for Herrnreiter's reassignment are even inconsistent. According to Odom, Herrnreiter's lack of law enforcement training accentuated the need for him to follow instructions when he was transferred to investigations. (Odom's Dep., at 36-39.) In other words, the two reasons are not materially different, and CHA's reason for reassigning Herrnreiter to auditor was not a pretext for discrimination based on race or national origin. CHA's motion for summary judgment on Herrnreiter's claims of race discrimination and national origin discrimination arising out of Herrnreiter's reassignment to auditor is granted because Herrnreiter cannot establish a prima facie case of discrimination and because CHA's reason for the reassignment was not pretextual.

B. Herrnreiters Termination

Under McDonnell Douglas, Herrnreiter cannot establish a prima facie case of intentional race discrimination or national origin discrimination arising out of the termination of his employment because he cannot show that he was meeting the legitimate expectations of the CHA at the time of his termination. Herrnreiter concedes that in September 1996 Turrubiartes gave him a significant audit assignment and that he failed to perform the assignment adequately. (Pl.'s 56.1 Response ¶¶ 64-67.) In his deposition, for example, Herrnreiter testified as follows concerning his failure to perform the audit assignment on time:

Q. When [Turrubiartes] told you that you were seven days behind schedule, was that true?
A. I do not know.
Q. Were you behind schedule?
A. Probably his schedule, probably. I do not know. I would assume yes. I don't think he made that up.

(Pl.'s Dep., at 198-99.)

Herrnreiter also concedes that, as a result of his failure to complete the audit, he was placed on a CAP and that he failed to meet several of the requirements of the CAP. (Pl.'s 56.1 Response ¶¶ 69-70, 80.) When presented in his deposition with a detailed list of the ways in which he had failed to perform the requirements of his CAP, Herrnreiter either acknowledged shortcomings or simply offered no response:

Q. According to Mr. Turrubiartes you failed to meet the CAP's requirements that you conduct proper audit research. Did you fail to meet that requirement?
A. Probably I failed to meet the requirement.
Q. On the second notch according to [Turrubiartes's] memorandum you failed to meet OIG and CAP requirements to document audit work in accordance with established OIG standards. Did you fail to meet those requirements?
A. I don't remember.
Q. And then down below there's four more things that you supposedly failed to do. The first is to meet the CAP deadline for completing the required comparative analysis between the Transamerica insurance policy and the Royal Macabees insurance policy. Did you fail to meet that deadline?
A. It is very possible, but I would like to emphasize that these are all subjective deadlines which were established by Mr. Turrubiartes in his mind.

* * *

Q. on the second thing down below [Turrubiartes] said that you failed to meet the CAP deadline for providing data pertaining to why the Royal Macabees policy was not reinstated. Did you fail to meet that deadline?
A. I don't remember.
Q. The third thing is [Turrubiartes] said that you failed to meet the CAP deadline for submitting the required draft report. Did you fail to meet that deadline?

A. It is possible. Again, all the deadlines he's talking about [are] subjective deadline[s] which he just grasped out of the air.
Q. The next question is on [Turrubiartes's] fourth item below he said that you failed to meet the CAP audit research requirement to obtain the old Royal Macabees insurance policy . . . Did you fail to meet that requirement?
A. It is possible.

(Pl.'s Dep., at 348-50.) Herrnreiter's only response to these facts is that the CAP was a "sham" designed to facilitate his termination. (Pl.'s 56.1 Response ¶ 80.) Nowhere in his brief or statement of facts, however, does Herrnreiter attempt to explain exactly how, as a matter of fact, the CAP was a sham. Instead, he makes unsupported allegations that the CAP was more complex than those given to black employees. (Pl. St. of Add'l Facts ¶ 36.3.) For example, Herrnreiter lists three black employees at the OIG — Norman Irvin, Eric French, and Arthur White — all of whom were allowed to finish their CAPs. (Id. ¶ 36.2.)
After identifying these employees, however, Herrnreiter sets forth no
specific evidence to demonstrate that his own CAP was more complicated
than the CAPs of the aforementioned three employees. Herrnreiter's theory
that black workers at the OIG were given less demanding CAPs is based
entirely on his own suppositions.

Herrnreiter also contends that the conditions of the CAP were "subjective," and that the CAP was designed with extra "hurdles" for him to overcome. (Id. ¶¶ 36.4.) For instance, Herrnreiter alleges that the audit assignment that formed the basis of the CAP, a project that required him to review each audit issued by the CHA in the first eight months of 1996, was itself unfair. (Id. ¶ 36.6.) Herrnreiter asserts that the project was "out of the ordinary" because he was required to prepare the audit program itself. (Id.) Disappointingly, CHA has not bothered to explain the purpose of this assignment. Nevertheless, Herrnreiter testified at his deposition that he

was trained and qualified to prepare audit programs. (Pl's Dep., at 62-65.) Herrnreiter's theory that the CAP was a mere pretense for terminating his employment consists mainly of speculation and surmise. A demonstration that one was meeting an employer's legitimate expectations requires more than these elements. Accordingly, the court must conclude that Herrnreiter fails in his attempt to establish a prima facie case of discrimination because he was not meeting the legitimate expectations of the CHA at the time of the termination.

Even if Herrnreiter were able to establish a prima facie case of race discrimination and national origin discrimination resulting from the termination of his employment, his claim would still fail because he cannot prove that the CHA's reason for terminating him was pretextual. Herrnreiter contends that the CHA's reason for terminating his employment was pretextual because black employees placed on CAPs were treated differently and because the CHA violated its own personnel policies in terminating him. Herrnreiter has not set forth credible evidence to support either of these theories, however. With respect to the CAP, Herrnreiter first claims that, while black employees in the OIG were allowed to complete their CAPs, he was terminated before the end of his CAP period. (Plaintiffs Memorandum, at 10.) Herrnreiter acknowledges, however, that he "probably gave up" while he was on the CAP. (Pl.'s Dep., at 295.) Herrnreiter therefore cannot reasonably contest Odom's decision to terminate his employment before the expiration of the thirty-day CAP period because he admittedly was not making a good faith effort to satisfy the CAP's requirements. Herrnreiter also contends that his CAP was more arduous than the CAPs given black employees and that the scope of his CAP was increased during the CAP period, but the only items of evidence he offers in support of these contentions are paragraphs 36.3 and 36.4 of his own statement of additional facts, which themselves cite only the original CAP document. (Plaintiffs Memorandum, at 10, citing Pl. St. of Add'l Facts ¶¶ 36.3, 36.4.) The court is unable to comprehend how the original CAP document itself supports the argument that Herrnreiter's CAP was more demanding than CAPs given to

black employees, or the argument that the scope of Herrnreiter's CAP was increased during the CAP period.

Nor is the court moved by Herrnreiter's contention that pretext is shown here by the CHA's violation of its own personnel policies in dismissing him. Herrnreiter alleges that Turrubiartes wrote four written reprimands of Herrnreiter but failed to follow the CHA's reprimand policy, which requires a supervisor to present written reprimands to the concerned employee. (Pl. St. of Add'l Facts ¶ 36.) As Turrubiartes testified at his deposition, however, the reason Herrnreiter never received the memoranda was that Turrubiartes did not intend them to be reprimands, but instead intended merely to document Herrnreiter's poor performance. (Turrubiartes Dep., at 51-67.) In this court's view, failure to advise an employee of his deficiencies is unwise. Herrnreiter does not suggest he was unaware of Turrubiartes concerns, however, and a review of the comments made concerning Herrnreiter's work product demonstrates that he was, in fact, on notice. After considering the entire record, the court concludes that Plaintiff has not presented evidence that creates a dispute of material fact concerning the legitimacy of CHA's reason for terminating Herrnreiter's employment. CHA's motion for summary judgment on Herrnreiter's claims of race discrimination and national origin discrimination arising out of the termination of Herrnreiter's employment is granted.

IV. Retaliation

In Count IV of his Amended Complaint, Herrnreiter asserts a claim for retaliation under Title VII. To establish a prima facie case of retaliation, Herrnreiter must show that: (1) he engaged in protected activity; (2) he suffered an adverse job action; and (3) there is a causal link between the protected activity and the adverse job action. See Krause v. City of LaCrosse, 246 F.3d 995, 1000 (7th Cir. 2001). CHA contends, and the court agrees, that Herrnreiter's retaliation claim must fail because he has not shown that he engaged in any statutorily protected activity.

To qualify as protected activity under Title VII, an employee must oppose an unlawful employment practice. See 42 U.S.C.

§ 2000e-3 (a); Reed v. Shephard, 939 F.2d 484, 492-93 (7th Cir. 1991). Herrnreiter's retaliation claim is based solely on his contention that in June of 1996 he complained to Odom about being called "sneaky" by Turrubiartes. Several months later he was transferred back to his position as auditor and then terminated from that position. As has already been stated, however, Herrnreiter himself admits that being called sneaky had nothing to do with his German national origin. (Pl.'s 56.1 Response ¶ 82; Pl's Dep., at 119-20.) Thus, Herrnreiter did not engage in a statutorily protected activity when he reported the incident to Odom. In any event, in his brief in opposition to CHA's motion for summary judgment, Herrnreiter makes no mention of his retaliation claim. For these reasons, the court grants CHA's motion for summary judgment on the retaliation claim.

CONCLUSION

Herrnreiter's harassment claim based on his German national origin fails because he cannot show that he suffered an objectively hostile work environment. Herrnreiter's discrimination claims based on race and national origin falter because Herrnreiter cannot show that his reassignment to auditor was a materially adverse employment action and that he was meeting the CHA's legitimate expectations when his employment was terminated. Furthermore, neither the CHA's reason for reassigning Herrnreiter to auditor nor the CHA's reason for terminating Herrnreiter was pretextual. Herrnreiter has abandoned his retaliation claim. For these reasons, CHA's motion for summary judgment (Doc. No. 73-1) is granted on Counts I-IV.

[fn1] The reasons for Holton's decision to transfer Herrnreiter are not apparent from the record. Nor is it clear why Holton did not have the authority to transfer Herrnreiter merely because Holton was an outgoing supervisor.

[fn2] The document itself is of no help in determining when, in fact, Plaintiff was transferred because it is dated January 5, 1996 and is signed by Holton on that date, but then signed again at the bottom with Odom's initials beside the later date of March 27, 1996. (Id.)

[fn3] "Jawohl" is German for "yes" or "indeed"

[fn4] Curiously, while both Plaintiff and Defendant agree that Plaintiff reported back to work as a Senior Auditor in September 1996, when he returned from vacation, both parties also agree that Odom and Howard actually signed Plaintiffs form to transfer him back on July 25, 1996. (See Pl.'s St. of Add'l Facts ¶ 47; Def.'s 56.1 Reply ¶ 47.) July 25, 1996 is clearly within the six month probationary period. Because neither asserts, however, that the transfer became effective on the date the form was signed, the court will assume it became effective on the date Plaintiff actually reported to work, September 9, 1996.

[fn5] In the Evidentiary Materials in Support of Plaintiffs Opposition to Defendant's Motion for Summary Judgment, Herrnreiter included an affidavit from himself alleging that, in addition to the four comments set forth above, on at least five occasions, Odom directed statements at Herrnreiter like "don't act like Hitler" and "you are parading around like Hitler." (Pl.'s Aff. ¶ 3, Ex. 6 to Evidentiary Materials in Support of Plaintiffs Opposition to Defendant's Motion for Summary Judgment.) The allegations in Herrnreiter's affidavit concerning remarks about Hitler made by Odom directly contradict testimony Herrnreiter gave in his deposition. In his deposition, Herrnreiter testified as follows concerning his interrogatory answer:

> Q. You also wrote in your answer that Odom made disparaging remarks towards you. Are these the Jawohl remarks?
> A. Yes, sir. That's correct. He made these remarks several times.
> Q. Were there any other remarks that were disparaging?
> A. To me they are disparaging because—
> Q. Were there any other remarks that he made that were disparaging of your National origin?
> A. No. These were the only remarks he made, but they have the same effect.

(Pl's Dep., at 399) (emphasis added). A party cannot effectively oppose amotion for summary judgment by contradicting his own deposition testimony. Piscione v. Ernst & Young, LLP, 171 F.3d 527, 532 (7th Cir. 1999). Frequent references and comparisons of Herrnreiter to Hitler would be extremely offensive and might well support a hostile work environment claim. Had such offensive comments in fact been made, the court expects Herrnreiter would have had no difficulty remembering them and recounting them when asked at his deposition for examples of Odom's improper comments. Herrnreiter offers no explanation for a purported memory lapse, and therefore the statements in his affidavit that contradict testimony he gave in his deposition will be ignored.

[fn6] The only tangible benefit of the investigator position seems to be that Herrnreiter was, as an investigator, entitled to a company car. What little case law exists on the subject, however, suggest that Herrnreiter's loss of a vehicle, without more, would not be sufficient to render the reassignment actionable. Cf. Von Gunten v. Maryland, 243 F.3d 858, 867 (4th Cir. 2001) (holding that employer's temporary withdrawal of employee's state-owned vehicle was not an adverse employment action for purposes of Title VII).

[fn7] Herrnreiter argues that his transfer was in fact authorized by Holton and not Odom. It is undisputed, however, that Odom also approved of the transfer in March of 1996. Whether that approval made Herrnreiter's transfer official, as CHA claims, or not, the "common actor" presumption is still valid here because Odom's approval in March still raises a presumption that he did not have any problem allowing Herrnreiter to take the position.

No. 01-3202

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SIEGFRIED HERRNREITER,	)Appeal from the United
	)States District Court for
Plaintiff-Appellant,	)the Northern District of
	)Illinois, Eastern Division
v.	)
	)
CHICAGO HOUSING AUTHORITY,	)No. 98 C 5209
	)
	)Rebecca Pallmeyer,
Defendant-Appellee.	)Judge

PLAINTIFF'S MOTION TO RECALL THE MANDATE

Appellant moves to recall the mandate issued herein for the reasons set forth in the accompanying affidavit, as summarized below:

1. The mandate should be recalled to prevent a miscarriage of justice.

2. The mandate should be recalled to permit appellant the opportunity to raise significant legal issues on petition for rehearing with suggestion for rehearing en banc, which will result in the Court's proper decision to set aside the District Courts decision granting Summary Judgment for the defendant-appellee.

3. The mandate should be recalled to permit appellant the opportunity to file a motion for Summary Judgment with this Court in his favor.

WHEREFORE , plaintiff-appellant respectfully requests that this motion be granted.

Siegfried Herrnreiter
Plaintiff-Appellant Pro Se

Siegfried Herrnreiter
4418 N. Richmond St.
Chicago, Illinois 60625
773-463-1769

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

AFFIDAVIT

I, Siegfried Herrnreiter, being duly sworn, state as follows:

1. I am the Plaintiff-Appellant Siegfried Herrnreiter, and I am acting as my own attorney in the case of Siegfried Herrnreiter v. Chicago Housing Authority (Case No. 98 C 5209) and Court of Appeals Case No. 01-3202.

2. My claims involve reverse employment discrimination by race and national origin in connection with a job transfer and termination from the subsequent job.

3. I appealed the District Court's Summary Judgment to the Court of Appeals as Case No. 01-3202.

4. I received an opinion from the Court of Appeals on Case No. 01-3202, issued on December 30, 2002, which affirmed the District Court's Summary Judgment decision in favor of the defendant-appellee.

5. The Court's decision resulted in a miscarriage of justice, since the Court failed to take into consideration all evidence, which I presented, which could prove unequivo-cally that there was a substantial difference between the investigator job and the auditor job, and that consequently, the job transfer did represent a *"materially adverse employ-ment action"*. I failed to point out its significance to this Court, although evidence was available on the New Hire's Personnel Action Request (New Par) form for Arthur White, per deposition of Cruse-Boyd, director of Human Resources, Exhibit #6. This document provides evidence that the black person, who replaced me as investigator, was hired at an annual salary of $49,000 whereas I only earned about $42,600! Had I pointed out this substantial difference in annual pay of $6,400, I trust that the Court would have rejected the CHA's argument that the

investigator and auditor jobs were substantially the same, and consequently also would have agreed with my contention, that the job transfer did represent a *"materially adverse employment action"*.

6. I also have two documents, which I failed to present to the Court, but would like to submit with my petition for rehearing in order to prevent a miscarriage of justice. These documents, if taken in context with the document referred under 5, will defeat a possible argument by the CHA that the difference in pay of about $6,400 can be attributed to better qualifications of the newly hired investigators. The first document, a two-page letter from Sharon Cruse-Boyd, Director of Human Resources, to Arthur White, with cc to Leonard Odom, dated December 26, 1996, provides evidence that Odom, the main decision maker, hired White in 1996 with a starting salary well above the $46,783 official maximum pay level for investigators. Two additional investigators, Berel Littman and Thomas Hoffman, were also hired in 1996 at $49,000. This provides evidence that the starting pay ($49,000) could not be reconciled with official records in the Human Resources Department at that time. The answer to this discrepancy in pay is provided by the second document: A memorandum from Cynthia Johnson/Betty Bussell, Compensation Analysts, to Leonard Odom, dated May 15, 1997, regarding a "Hay Implementation Appeal for Position of: Investigator" of a decision to reevaluate the investigator position and Odom's approval to establish new (higher) salary ranges for investigators as follows: Min: $38,629.00; Mid: $48,287.00 and Max: $57,944. It shows that the investigators hired in 1996 received a pay which was slightly above the new medium pay level. Thus, this document will prove beyond a reasonable doubt that the starting salaries in 1996 already reflected an increase in salary ranges for which paperwork in the Human Resources Department was lagging behind but formally documented in May of 1997. The Court can now clearly discern Odom's scheming : It suggests that the real motif for transferring me was that he did not want me to benefit from the impending upgrade in salary ranges. Since he could not provide a valid reason for my transfer, the Court should infer that his motif was illegal and that he was scheming that I should forego a potential pay increase. The

amount in question, $6,400 per year, does represent a *"materially adverse employment action"*.

7. I also have two documents, which I failed to present to the Court, but would like to submit with my petition for rehearing in order to prevent a miscarriage of justice. These documents also prove that there was a major difference in the pay between the investigator and auditor jobs, and that I had to forego a pay adjustment of $8,400. Two of my investigator colleagues, Linnie Price and Norman Irvin, received retroactive pay raises to $51,000 effective January 1, 1997, while I was out of a job and drawing unemployment benefits.

8. The documents referred to under 5, 6 and 7 also shed new light on the decision maker's motive for my swift termination, namely, to prevent me from learning about a substantial upgrade of the Investigator's job and increase in pay which I had to forego.

9. I am convinced that, had the Court been aware of this difference in pay, its decision regarding unlawful discrimination in my job transfer would have been in my favor, since I can now show that the *two jobs, the investigator job and the auditor job were significantly different*, the first being more desirable just for pay alone. This provided the missing component for my prima facie case.

10. I am convinced that, had the Court been aware of this information, the decision regarding my termination would have been different: Odom knew that it would be difficult, if not impossible, to keep the increase of investigator salary ranges in 1996 a secret, as long as I was in the OIG department. He needed to facilitate my departure and this is how he determined that I was dispensable. His scheme could be termed as *"preemptive termination"*.

11. The Court erred in that it did not apply Summary Judgment Standards, which require that the evidence will be construed in the light most favorable to the party opposing the motion. Although I provided written documentation of a performance evaluation, which showed that I exceeded their expectations and which had no negative comments, the CHA

did not provide any records supporting their position. Yet, the Court stated in its opinion that there is *irrefutable evidence* that Appellant had problems doing interviews. This conclusion does not seem to reflect the weight of the evidence submitted on this issue.

12. The Court erred in that it accepted the Appellee's reason for my transfer, which was now a *disciplinary reason,* although there was no mention of disciplinary problems before the Illinois Department of Human Rights, and no negative comment in my performance evaluation. This is contrary to a prior Court decision, which determined that a party was barred from citing a disciplinary problem, which it did not mention in an earlier proceeding. Additionally, it does not reflect the evidence submitted on this issue.

13. The Court erred in that it did not apply Summary Judgment Standards, which require that the Court grant Summary Judgment only if there are no major unresolved issues. Here, a material unresolved issue existed, which is central to the whole case, in the *motive* of the decision maker for transferring me from my investigator job. Although the Appellee produced two different reasons for my transfer, one *lack of law enforcement training* before the Illinois Department of Human Rights, and in this Court *disciplinary action,* the Court affirmed the District Court's Summary Judgment decision.

14. The Court erred in that it did not apply Summary Judgment Standards, which require that the Court grant Summary Judgment only if there are no major unresolved issues. Although I provided written documentation of performance evaluations for a three year period (1992 to 1994), which were satisfactory, and alerted the Court that the special audit project was out of the ordinary for staff auditors, and that papering of my file during a ten day crash period was suspect, the Court accepted Odom's argument that I had performance problems as auditor. This conclusion also does not seem to reflect the weight of the evidence submitted on this issue.

15. The Court erred in that it did not apply Summary Judgment Standards, which require that the Court grant Summary Judgment only if there are no major unresolved issues. Here, a material unresolved issue existed in Odom's motif for assigning an unusual project to me, which was intended to have me fail. See also the true motif, which I mentioned under 10 above. Yet, the Court affirmed the District Court's Summary Judgment decision.

16. Further affiant sayeth not.

Signed:_____

Siegfried Herrnreiter,
Plaintiff-Appellant Pro Se

Signed and sworn to before me, this
_____

_____
NOTARY PUBLIC

CERTIFICATE OF SERVICE

I, hereby certify that I served this Motion to Recall the Mandate by placing a copy in an envelope with sufficient First Class Mail postage affixed and directed to the person named below at the address indicated, and depositing that envelope in the Roseland United States Post Office mailbox located at the 11033 S. State St., Chicago, Illinois 60628, before the end of the business day on March 10, 2003.

_____

Siegfried Herrnreiter,
Plaintiff-Appellant Pro Se

Person served:

Gregory D. Isbell
Franczek Sullivan, P. C.
300 S. Wacker Dr.
Suite 3400
Chicago, Illinois 60606

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

March 14, 2003

Before

Hon. RICHARD A. POSNER, Circuit Judge

SIEGFRIED HERRNREITER, Plaintiff-Appellant,		]Appeal from the United]States District Court for]the Northern District of
No. 01-3202	v.	]Illinois, Eastern Division]
CHICAGO HOUSING AUTHORITY , A public housing authority in Cook County, Chicago, Illinois, Defendant-Appellee		] No. 98 C 5209]] Rebecca R. Pallmeyer, Judge,

Upon consideration of the PLAINTIFF'S MOTION TO RECALL THE MANDATE, filed on March 13, 2003, by the pro se appellant,

IT IS ORDERED that the motion is DENIED.

EVIDENCE & ARGUMENTS PROVIDED BY PETITIONER IN BRIEF OR REPLY BRIEF REGARDING TRANSFER, COUNT 1:

Different Reasons for Transfer, a Question of Fact

[Petitioner] testified that, at the time of the transfer, Odom told him the transfer reason was that [Petitioner] lacked law enforcement experience. Jeriel Howard testified that, at the time of the transfer, Odom told him the same thing. R. Item 83, Plt.'s Evidentiary Materials, Ex. 2, at 56:14–24. The CHA's position statement to the Illinois Department of Human Rights likewise gives [Petitioner]'s lack of a law enforcement background as the basis for the transfer. R. Item 83, Plt.'s Evidentiary Materials, Ex. 5, G-11 at 3.

In this litigation, however, the CHA contends that [Petitioner] was transferred because he failed to follow instructions. CHA Brief at 3. More to the point, the principal allegation is that [Petitioner] was insubordinate to Odom when he continued to research a contract price issue contrary to Odom's instructions. *Id.* [Petitioner] denied that such a[n] instance ever occurred.[1] R. Item 81, Plt.'s Rule 56.1 Resp., ¶ 35.

a. The CHA asserts that "no reasonable jury would find these reasons materially different or inconsistent." *Id.* at 18. In fact, they are both materially different and inconsistent.

These two reasons are materially different because an employee's lack of law enforcement experience is not a behavioral or disciplinary problem. The failure to follow instructions, particularly if it rises to the level of insubordination as Odom claimed, is a serious disciplinary problem that few employers would tolerate.

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[1] Nor has the CHA offered an explanation as to why Odom was giving Plaintiff orders, instead of Plaintiff's supervisor, Jeriel Howard.

The two reasons are inconsistent because if an employee is insubordinate, his background or work experience generally does not shield him from the disciplinary consequences of his misconduct. According to the CHA's logic, [Petitioner]'s failure to follow instructions and insubordination demanded transfer *only because* he lacked law enforcement experience. But if [Petitioner] was insubordinate to Odom, it could make no difference whether [Petitioner] had no experience or was the former chief of the Chicago Police Department.

The CHA's persistent effort to reconcile these two different reasons turns farcical, however, because Odom testified that he did not use [Petitioner's] lack of law enforcement experience as a reason for the transfer. Notwithstanding Jeriel Howard's testimony to the contrary, Odom claims that he did not give lack of experience to Howard as the transfer reason. R. Item 83, Plt.'s Evidentiary Materials, Ex. 1, at 114:23–15:10. Nor, he claims, did he give that reason to [Petitioner].

But this is not the only discrepancy between the testimony of Odom and that of Howard on the transfer issue. The CHA claims that the two different reasons were "two sides of the same coin in Odom's mind," and that "these issue were on Howard's mind as well." CHA Brief at 19.

There is nothing in the record to substantiate the claim that Howard was of the same mind as Odom, and in fact, the evidence goes in the other direction. Howard testified that, at the meeting where Odom gave him [Petitioner]'s lack of experience as the reason for the transfer, Odom told Howard point blank that [Petitioner] would be transferred. Of that meeting, Howard testified:

> Mr. Odom came into my office and informed me, not suggested to me, as my superior that he was transferring [Herrnreiter] back to the audit division. He didn't ask me. He didn't suggest it to me. He didn't ask me whether I approved or dissented. He simply told me as my superior – he walked into my

> office and told me he was transferring [Herrnreiter] back to the audit division. R. Item 83, Plt.'s Evidentiary Materials, Ex. 2, at 55:3–13. Odom testified that he did not recall who initiated the transfer suggestion. *Id.*, Ex. 1, at 43:11-21.

Here, Odom's credibility is at play. Questions of fact exist between Petitioner's supervisor Howard and Odom on the reason for [Petitioner]'s transfer. A factual dispute exists as to what the decision-maker Odom said at the time of transfer, and what he claims now.

Pretext and Violation of Policy: Transfer with Excellent Performance

(i) Petitioner's Performance as Investigator "Exceeded Expectations."

In receiving a 3.96 out of 5.0, Petitioner's performance as identified by his July 1996 evaluation "Exceeded Expectations." App. 37. Jeriel Howard, [Petitioner]'s supervisor and rater, testified that [Petitioner]'s evaluation was "one of the highest marks within the investigations division." R. Item 83, Plt.'s Evidentiary Materials, Ex. 2, at 35:5–7

Howard continued: "Excellent performance in use of skills, techniques and proce-ses [sic]"; "Outstanding performance in both quality and quantity of finished work product"; and "Investigations conducted in a manner to produce meaningful results." App. 35-36. Under the "Strengths" section, Howard wrote of [Petitioner]: "Performs well in taking statements, quality reports submitted timely. Quality and especially quantity of work is excellent." App. 34-37. These are not comment appraising potential, but performance. . Days later, [Petitioner] was removed from his investigator position.

Notwithstanding Odom's claim of [Petitioner]'s insubordination, the performance evaluation is completely devoid of any critical comments of any sort. App. 34-37. Further, some of the written comments actually undercut the CHA's claim of alleged performance deficiencies. For example, the CHA claims that [Petitioner] was improperly questioning witnesses by asking leading questions. Yet Howard's comments about Petitioner's "Strengths" seem to contradict that claim, praising his ability to take statements. App. 37.

Petitioner did receive a "Does Not Meet Expectations 2" in the goal "Communicates effectively and accurately in both oral and written form." App. 34. But the performance evaluation is internally inconsistent on this point, because in the "Essential Job Performance Standards", App. 35, Howard gave Petitioner a "Meets Expectations 3" rating in "Communications and interpersonal skill use with co-workers, superior and residents." *Id.* And while Petitioner's communications rating differed in those two categories, every other investigator Howard rated in July 1996, had the same ratings number between the Skills Assessment and Performance Standards. Benton Fisher received communications ratings of "4" in Skills Assessment and "4" in Performance Standards. R. Item 83, Plt.'s Evidentiary Materials, Ex. 2, D000428-29. Norman Irvin received a "4" in Skills Assessment and "4" in Performance Standards. *Id.* at D000424-25. Linnie Price received a "5" in Skills Assessment and a "5" in Performance Standards. *Id.* at D000432-33.

In addition to these inconsistencies, Howard could not testify as to whether any of the ratings were changed after Odom reviewed [Petitioner]'s evaluation. Howard testified that Odom did review the evaluation. R. Item 83, Plt.'s Evidentiary Materials, Ex. 2, at 49:7-12. But after testifying unequivocally that no ratings were changed, Howard corrected himself, and stated that he could not remember whether they were or were not modified.

[Questioning by [Petitioner]]

Q. Did you change any of my job performance ratings after somebody talked to you in 1996?
A. No.
Q. Isn't it true that – –
A. I should say I don't recall that. I don't recall that.
R. Item 83, Plt.'s Evidentiary Materials, Ex. 2, at 50:10-16.

Finally, no scrap of paper exists to support Odom's serious claim of insubordination. When asked how many times [Petitioner] failed to follow instructions, Odom responded that he did not "keep a score card" on Petitioner.

Consequently, a question arises, whether Odom genuinely believed the claim of insubordination and failure to follow instructions at the time of the transfer, because evidence that supports pretext calls into question the truthfulness of the employer's reason for the adverse employment action. *Olsen v. Marshall & Ilsley Corp.*, 267 F.3d 597, 601 (7th Cir. 2001).

(ii) Odom Violated CHA Policy by Transferring Petitioner After He Received the "2" Rating.

An employer's violation of its own stated rules may give an inference of discrimination. *Williams*, 85 F.3d at 275. CHA policy requires that a rater provide written justification for a performance rating of "2" or "1", and complete a corrective action plan for the employee. R. Item 101, Ex. 5, DFRP Ex. F-16 at 4 n.6. "Performance Evaluation ratings of 2 or 1 must be accompanied by written justification and completed Corrective Action Plan (CAP) form. These accompanying documents must have the signed approval of the Department Head." *Id.*

CHA policy requires that a non-probationary employee who receives a "2" rating be placed on a CAP. R. Item 101, Ex. 5, CHA's Performance Management Process, Phase III, Performance Evaluation, at 45. Under that CHA policy, probationary employees, those who have worked six months

or less in a new position, and who receive a "2", are *not* to be placed on a CAP, because those employees are new to the job and still learning. *Id.* And not only are the probationary employees not to be placed on CAP, but they are to receive a prorated merit pay increase. *Id.*

As noted above, Petitioner's evaluation did not include written justification for the "2" rating, and that violated CHA policy.

More importantly, the CHA contends that the "2" rating that Petitioner received justified Odom's transfer of him. "In short, Herrnreiter failed to meet his employer's expectations in one critical area. This was sufficient reason to end his short tryout as an investigator and return him to his previous position." CHA Brief at 21. Not according to the CHA's policy. According to that policy, the most that should have happened is that Petitioner should have be placed on a corrective action plan. According to the CHA's own policy, Petitioner should not have been disciplined, or transferred out of the investigator's position.

Moreover, Odom contended that, at the time Petitioner received the July 1996 performance evaluation, Petitioner was still a probationary employee. If that were true, then according to the CHA's policy, Petitioner should not even have been placed on a CAP. Regardless of which way the situation is viewed, the CHA violated its stated rules by transferring Petitioner.

Different Treatment of Black Investigators Calls into Question Transfer Reason of Insubordination

Petitioner contends that Odom's claim of insubordination is false, and thus could not have been the reason for the transfer. One way to test that issue is to look at how the CHA treated persons who were insubordinate, failed to follow instructions, or committed some other infractions. Petitioner has demonstrated that two black investigators, who either failed to follow instructions or committed potentially

more serious infractions, were not removed from their positions. The black investigators were treated differently, since their conduct only resulted in letters of reprimand. Thus, the question is why Petitioner was transferred instead of receiving a letter of reprimand. Since Petitioner was treated differently, and more harshly, it suggests some other reason behind the transfer decision.

CHA had no Basis to Assert that Petitioner's Probationary Period had Changed.

The CHA contends that both the IG and the CHA's chief operating office had to approve the transfer document. R. Item 73, Def.'s Rule 56.1 Stmt., ¶ 28. (Although why the CHA's Chief Operating Officer did not sign the transfer form in January, or why she could not sign after Holton's January signature, is not explained.) Nonetheless, the CHA's human resources director, Sharon Boyd, testified that the effective date shown on an M-PAR is the operative date for purposes of personnel actions, R. Item 83, Plt.'s Evidentiary Materials, Ex. 3 at 22:15-17, including the initiation of probationary periods. *Id.* at 24:13, 16-17. Boyd further testified that the head of the OIG, Holton, had the authority to approve [Petitioner]'s transfer. *Id.* at 14:24-15-2.

Thus, if as the CHA asserts, Odom was simply "finalizing" the transfer of Petitioner in March, the CHA would have had no basis to argue before the District Court that Petitioner was still a probationary employee in late July and August, 1996. Furthermore, the CHA's argument that its chief operating officer had to sign the M-PAR to make it "official" apparently did not effect the validity of [Petitioner]'s August M-PAR, since she did not sign that document either. App. 38.

CHA's Statement to the IDHR, that Petitioner was Replaced by a White Man of German Extraction.

The CHA admits now, that the Illinois Department of Human Rights (IDHR) was told that [Petitioner] was replaced by a white male of German extraction, when in actuality he was replaced by Arthur White, a black male. More importantly, the CHA's own documents expressly identify White as the replacement for [Petitioner], R. Item 83, Plt.'s Evidentiary Materials, Ex. 3, at D001607, D001609; Littmann as the replacement for Fisher. *Id.*, Ex. 3, at D002458-59.

Here, only one person replaced Plaintiff as investigator, and that was Arthur White. And while the CHA's statement to the contrary before the IDHR does support the inference of pretext. For purposes of establishing pretext, the CHA's proffered reason for the transfer is false.

Failure to Advance Petitioner's Alleged Performance Problems at the Agency Level

In *McCoy*, WGN defended the charge of age discrimination before the Illinois agency by claiming, financial reasons forced McCoy's transfer and eventual termination. *Id.* at 370. But once the federal court action was filed, WGN added that plaintiff also had performance problems. *Id.* at 373. The plaintiff argued that WGN's failure to raise the performance issue before the state agency suggested that performance was not a plausible reason for his transfer and termination. *Id.* The Court noted that WGN's failure to advance the plaintiff's performance at the agency level was evidence that the plaintiff's performance was not the true motivation for the adverse actions. *Id.* However, the Court went on to state that, due to the varying factors at work in the different fora, a change in a defendant's position from a state administrative proceeding to federal court would not be pretext *per se* for summary judgment purposes. Thus, the issue in *McCoy* was whether a defendant's assertion of a second or subsequent nondiscriminatory reason for the adverse employment action would automatically be a basis for pretext.

EVIDENCE PROVIDED BY PETITIONER REGARDING TERMINATION, COUNT 2:

Termination within one Month Raises Issues of Material Fact.

Between his initial hire with the CHA, in April 1992, and his transfer to the investigations department, in January 1996, Plaintiff performed his duties as an auditor in a satisfactory manner. After his transfer from the investigator position, Plaintiff again took up his duties in the auditing department on September 9, 1996. By October 10, 1996, Odom had made the decision to terminate Plaintiff.

Issues of Material Fact Exist, Whether Corrective Action Plan was Simply a Devise to Cover Plaintiff's Wrongful Termination.

On September 13, 1996, four days after Plaintiff reassumed his duties as auditor, Turrubiartes gave Plaintiff a "significant" audit project. R. Item 73, Def.'s Rule 56.1 Stmt., ¶ 64. The project required Plaintiff to prepare a general audit program, in the nature of a template, and specific audit programs geared toward assessing prior OIG audits. *Id.* at ¶ 71. Turrubiartes assigned the project to Plaintiff in a "detailed memorandum," which identified 11 steps that Plaintiff was to take to complete the project. *Id.* at ¶ 65. Turrubiartes further directed Plaintiff to submit to him project documents contemporaneous with their creation by Plaintiff, so that Turrubiartes could review them.

Plaintiff contends that the work required on the project was not the province of auditors. R. Item 82, Plt.'s Rule 56.1 Add'l. Stmt., ¶ 36.6. Rather, because of the judgment and discretion involved, such work had always been performed by audit supervisors. *Id.* The CHA disagrees, but states that Plaintiff nonetheless was trained to prepare an audit program. R. Item 90, Def.'s Rule 56.1 Reply Stmt., ¶ 36.6.

Approximately two weeks later, on September 30, Turrubiartes was already complaining that Plaintiff one week behind on the project. Plaintiff conceded that he probably was behind, but that Turrubiartes had set an unrealistic schedule

for completion of the project. R. Item 74, Def.'s Appendix, Ex. A, at 199:4-13.

The following day, October 1, 1996, Turrubiartes called a meeting of the auditors and announced that any auditor not producing the quality of work he expected would be subject to written reprimand and given 30 days to improve. R. Item 90, Def.'s Rule 56.1 Reply Stmt., ¶ 67.

The day after that, on October 2, Turrubiartes, acting on Odom's instruction and at Odom's instigation, placed Plaintiff on a 30-day Corrective Action Plan (CAP). The CAP was based on Plaintiff's alleged failure to timely produce the audit programs, and various other criticisms by Turrubiartes. *Id.* at ¶ 65.

On October 3, October 4, October 7 and October 8, 1996, Turrubiartes wrote memoranda critical of Plaintiff's performance. *Id.* at ¶ 36. Although the principal purpose of the CAP is to assist the employee to improve job performance, Turrubiartes did not show Plaintiff the memoranda documenting his alleged shortcomings. *Id.* Rather, Turrubiartes simply placed them in Plaintiff's personnel file. *Id.*

The CHA admits that Turrubiartes did not provide the memoranda to Plaintiff, but claims that the memoranda were not meant as reprimands, but "efforts by Turrubiartes to document Plaintiff's deficiencies." *Id.* at ¶ 36. Turrubiartes claims that he spoke to Plaintiff about his poor performance, *Id.*, Plaintiff denies that claim. R. Item 82, Plt.'s Rule 56.1 Add'l Stmt., ¶ 36.1.

On October 10, 1996, eight days into Plaintiff's 30-day CAP, Odom instructed Turrubiartes to question the CHA human resources department to determine whether Plaintiff could be fired prior to the completion of his 30-day CAP. When that query was answered in the affirmative, Odom determined to terminate Plaintiff.

(i) The Nature of the Assignment and the Speed with Which Odom Acted to Place Petitioner on the Corrective Action Plan Once He Received the Assignment, Coupled with Turrubiartes' "Papering" of Petitioner's Personnel File, Suggest Bias.

As the District Courtnoted, the CHA made no effort to explain the purpose of the "significant" assignment Plaintiff received on his return to the auditing department. App. 24. Plaintiff maintains that, based on his experience as auditor for the CHA, the assignment he received on September 13, 1996, was unusual; one which was customarily performed by audit supervisors, and not by the auditors themselves, since it called for discretion and judgment. The CHA denies that the assignment was unusual for an auditor, but adds that Plaintiff's past experience, experience outside the CHA, made him capable of performing the assignment in any event.

In September 1996, Plaintiff had worked as a senior auditor for the CHA for three and one-half years. Each of Plaintiff's performance reviews documented satisfactory performance. Yet shortly after his return from investigations department, and approximately two weeks of after receiving the audit project, Plaintiff performance was alleged to be so wanting that he was placed on the CAP, at Odom's direction.

The CAP itself was a lengthy memorandum. Within one week of being placed on the CAP, Turrubiartes had written four additional memoranda critical of Plaintiff's performance. Notwithstanding the fact that the purport of the CHA's Corrective Action Plan is to improve an employee's job performance, Turrubiartes simply placed the memoranda in Plaintiff's personnel file.

Further, as apparent from Turrubiartes' memorandum to the human resources department of October 10, 1996, the 30-day CAP was in practice a one, two or three day CAP. R. Item 83, Plt.'s Evidentiary Materials, Ex. 4, Ex. H-21. The memorandum identified CAP deadlines that Plaintiff was alleged to have failed to meet within one day of being placed on the CAP. *Id.*; *see also* R. Item 83, Plt.'s Evidentiary Materials, Ex. 4, Exs. G-05 – G-08.

The performance of duties which call for the use of judgment and discretion obviously leave more room for attacks on the use of that discretion. Plaintiff was assigned duties which called for the use of such discretion, then criticized based on subjective criteria. The speed with which Plaintiff was placed on the CAP, and then deemed to have failed to meet its obligations, and the substantial amount of "papering" of

Plaintiff personnel file, is adequate to forestall summary judgment.

(ii) The Corrective Action Plan Plaintiff Received Was Significantly More Onerous and Subjective than the CAPs on Which Black Employees Were Placed.

The CAP on which Plaintiff was place consisted of five pages of closely typed text. R. Item 74, Def.'s Appendix, Ex. A.22. Although the CAP length suggest a certain level of specificity and detail, in fact the performance requirements Plaintiff was expected to meet were vague and subjective. For instance, Plaintiff was to: "[d]evelop audit programs properly"; "[c]onduct proper and necessary research"; "[d]ocument all audit work properly." *Id.* at 5. Plaintiff was expected to perform each phase of the project within the time constraints set by Turrubiartes. *Id.* Further, the CAP stated that "[a]ny deviations must be the result of conditions beyond [Plaintiff's] control which [Plaintiff] will be required to prove." *Id.*

In contrast, the three black employees place on CAPs received one-page "plans." In its entirety, Investigator X's CAP notice reads "Investigator X needs to put more time and attention on his completed project. During the day often times Investigator X is 'nodding' at his desk this [sic] activity must be curtailed." R. Item 99, Sealed Documents, at D002810. The plan itself consisted of one page which stated the employee objective as:

1. Full & complete reports
2. More attention to detail

Id. at D002811.

Investigator Y's CAP plan was likewise one page, and the objective was:

1. Write-ups' [sic] Investigative Reports need to be completed in a timely manner.
2. Monthly briefing book writeup's [sic] need to be fully explained submitted in timely manner.
3. Deadlines need to be met when promised.

Id. at D001642.

Eric French's CAP plan was the most elaborate, and required that he:

Provide a statement explaining absences
Report to work daily
Complete all outstanding typing assignments
Complete all outstanding filing, secure files, and structure a coherent filing system

Id. at D00683.

Contrary to the finding of the district court, App. 24, Plaintiff's CAP was far and away more detailed and complex than the CAPs on which black employees were placed. At the same time, Plaintiff's CAP contained numerous vague and subjective criteria, substantially at odds with the admonition that an employee "report to work daily," or that an employee "curtail" his "'nodding' at his desk." It was this vague and subjective criteria that gave cover to the CHA's termination of Plaintiff in what must be record time.

(iii) Black Employees Placed on CAPS Were Permitted to Fulfill the Term of Their CAP.

Investigators X and Y and Employee Z were all permitted to complete the terms of their CAPs. R. Item 90, Def.'s Rule 56.1 Reply Stmt., ¶ 36.2. Plaintiff was not. Furthermore, the fact that Odom and Turrubiartes had to query the human resources department as to whether it was permissible to terminate an employee during the pendency of the CAP suggests that it is not commonplace to terminate an employee prior to the completion of the CAP period.

Other Evidence of National Origin Discrimination.

Plaintiff testified that both Odom and Turrubiartes made repeated comments to him about his accented speech, or addressed him in the German language. Odom, in particular, would pepper his conversations with Plaintiff with the terms "jawohl," and "jawohl mein Herr." The District Courtdetermined that such mild references to Plaintiff's national origin could not support a claim of hostile work

environment, a conclusion that Plaintiff does not challenge on appeal.

But while the comments may not suffice to establish a hostile work environment, they may still contribute to an overall inference of discrimination. The use of German terms by Odom in his conversation with Plaintiff could have a wholly innocent explanation: that Odom was interested in learning the language and was practicing before a native speaker. However, there is nothing in the record that suggests such an interpretation, and certainly this was not Plaintiff's impression.

In fact, the repeated use of these terms may suggest a preoccupation with Plaintiff's German background. Odom used the terms often upon meeting Plaintiff, which could indicate that foremost in Odom's mind was Plaintiff's national origin.

Petitioner Has Produced Sufficient Evidence of Pretext in His Termination to Preclude Summary Judgment.

The CHA professes confusion as to Plaintiff's contention, but it is simply this: Leonard Odom intended to terminate Plaintiff, and the transfer, the "significant project," CHA Brief at 25, assigned days after he resumed the auditor position, and the Corrective Action Plan, imposed about two weeks later, were the tools of that intention. *See McCoy v. WGN Continental Broadcasting Co.*, 957 F.2d 368, 372 (7th Cir. 1992)(transfer and discharge separate acts of unitary act of discriminatory discharge). The CHA claims that after the transfer, Plaintiff was not meeting its expectation. CHA Brief at 28. But the expectations of the employer must be legitimate, and placing insurmountable hurdles in the path of a targeted employee is not. *Shager*, 913 F.2d at 405.

Within four days of Plaintiff's reassignment to auditor, Abel Turrubiartes assigned Plaintiff a "significant" audit project. R. Item 73, Def.'s Rule 56.1 Stmt., ¶ 64. In Plaintiff's experience, such a project, creating audit programs, was highly unusual for auditors. Because such projects called for judgment and discretion, they were always performed by

audit supervisors. R. Item 82, Plt.'s Rule 56.1 Add'l. Stmt., ¶ 36.6.

The CHA interprets this to be at odds with Plaintiff's assertion that he preferred the freedom and independence of the investigator position. CHA Brief at 28. Of course the point is that assignments that call for judgment or discretion are more open to subjective, and false, criticism. As the CHA acknowledges, the audit project was "demanding," CHA Brief at 28, and it does not deny that the project required discretion. As well, the schedule for completion of that "demanding" project was unrealistic in Plaintiff's experience, R. Item 74, Def.'s Appendix, Ex. A, at 199:4-13, a further claim the CHA does not address, except to pronounce the assignment "fair." CHA Brief at 28.

Just two weeks after receiving the assignment, Turrubiartes claimed that Plaintiff was already a week behind. Two days after that, Odom ordered Plaintiff placed on the Corrective Action Plan. R. Item 90, Def.'s Rule 56.1 Reply Stmt., ¶ 65. Thus, despite the fact that Plaintiff had performed satisfactorily as an auditor for three and one-half years with the CHA, about a fortnight after resuming the auditor position Plaintiff was marked as performing poorly and threatened with termination. During the next week, Turrubiartes wrote four memoranda critical of Plaintiff. Even though, presumably, the purpose of the CAP is improve the performance of the employee, Turrubiartes did not give those memoranda to Plaintiff, but placed them in his personnel file. The CHA admits that Turrubiartes did not provide the memoranda to Plaintiff, but claims that Plaintiff has no evidence that the memoranda were untrue. CHA Brief at 28-29. Obviously, if Turrubiartes set the project parameters, the timetable, and decided whether performance was or was not adequate based on subjective criteria, Turrubiartes's claims of deficient performance would be impossible to gainsay.

So too, the CAP. The CAP on which Plaintiff was place, instigated and approved by Odom, consisted of five pages of closely typed text. R. Item 74, Def.'s Appendix, Ex. A.22. As Plaintiff has noted, although the CAP was lengthy, the performance standards were vague and subjective. Plaintiff was told to: "[d]evelop audit programs properly"; "[c]onduct proper and necessary research"; "[d]ocument all audit work

properly." *Id.* at 5. Plaintiff was expected to perform each phase of the project within the time constraints set by Turrubiartes. *Id.* Further, the CAP stated that "[a]ny deviations must be the result of conditions beyond [Plaintiff's] control which [Plaintiff] will be required to prove." *Id.* Plaintiff has noted the substantial difference between his CAP and those on which black employees were placed. Predictably, the CHA's response is that Plaintiff's CAP and those of other employees were "not comparable." But that is the point. The CHA repeatedly claims that Plaintiff had "broad performance problems," and the other employees did not. But that is not borne out in the record. The black employees generally had the same types of performance problems Turrubiartes claims Plaintiff had: failure to meet deadlines, incomplete reports, inaccurate work. CHA Brief at 29, 30. Yet the CHA characterizes the performance problems of those employees "relatively minor." *Id.* at 30. The CAPs of those employees consisted of one page of several sentences with instructions like "report to work daily."Odom and Turrubiartes devised a project, of questionable value to the CHA, at which Plaintiff was destined to fail. When the inevitable occurred, Odom and Turrubiartes devised a like Corrective Action Plan, complex and detailed, yet riven with subjective criteria and vague goals. Within *one day* of being placed on the CAP, Turrubiartes claimed Plaintiff had failed to meet the plan goals, and eight days after being placed on the CAP, Odom had decided to terminate Plaintiff.